THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1994 CUMULATIVE SUPPLEMENT

Volume 11

Chapters 59 through 89E

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 443 S.E.2d 468. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 11 contains the general laws of a permanent nature enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the new law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session affecting Chapters 59 through 89E of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 336, p. 77.
North Carolina Court of Appeals Reports through Volume 114, p. 505.
South Eastern Reporter 2nd Series through Volume 443, p. 468.
Federal Reporter 3rd Series through Volume 21, p. 1127.
Federal Supplement through Volume 848, p. 212.
Federal Rules Decisions through Volume 154, p. 535.
Bankruptcy Reports through Volume 166, p. 498.
Supreme Court Reporter through Volume 114, p. 1877.
North Carolina Law Review through Volume 72, p. 1128.
Wake Forest Law Review through Volume 29, p. 646.
Campbell Law Review through Volume 16, p. 145.
Duke Law Journal through Volume 43, p. 1348.
North Carolina Central Law Journal through Volume 20, p. 229.
Opinions of the Attorney General.

The General Statutes of North Carolina 1994 Cumulative Supplement

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ARTICLE 2.

Uniform Partnership Act.

Part 1. Preliminary Provisions.

§ 59-32. Definition of terms.

In this Article:

(1) "Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any State insolvent act.

(2) "Business" includes every trade, occupation, or profession.

(3) "Conveyance" includes every assignment, lease, mortgage, or encumbrance.

(4) "Court" includes every court and judge having jurisdiction in the case.

(5) "Person" includes individuals, partnerships, corporations, limited liability companies, and other associations.

(6) "Real property" includes land and any interest or estate in land.

(7) "Registered limited liability partnership" means a partnership that is registered under G.S. 59-84.2 and complies with G.S. 59-84.3. (1941, c. 374, s. 2; 1993, c. 354, s. 3.)

Editor's Note. — Session Laws 1993, c. 354, s. 29 is a severability clause.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in subdivision (5) inserted "limited liability companies"; and added subdivision (7).

Part 2. Nature of a Partnership.

§ 59-36. Partnership defined.

CASE NOTES

Applied in Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

Quoted in Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990); Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

Cited in Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

§ 59-37. Rules for determining the existence of a partnership.

CASE NOTES

Express Agreement Not Required. —

Existence of a partnership does not require an express agreement and the parties' intent to formulate a partnership can be inferred by the conduct of the parties by examining all the circumstances. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Co-ownership and sharing of any actual profits are indispensable requisites for a partnership. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Sharing Profits. — Although sharing profits does not of itself establish a partnership, the Uniform Partnership Act emphasizes the importance of sharing profits in the existence of a partnership by mandating that the receipt by a person of a share of the business profits is prima facie evidence that he is a partner. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Filing of a certificate to transact business under an assumed name, pursuant to § 66-68, does not manifest intent to form a partnership. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

The filing of a partnership tax return, etc. —

In accord with the main volume. See Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Applied in Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

§ 59-38. Partnership property.

CASE NOTES

Liability Insurance — Property of Joint Venture. — Where church purchased liability insurance pursuant to a joint venture agreement and on account of voluntary association between it and not-for-profit organization with which it ran a day care program, the insurance was purchased on account of the joint venture and was therefore an asset of the joint venture. Jones v. Shoji, 110 N.C. App. 48, 428 S.E.2d 865, petition allowed as to additional issues, 334 N.C. 163, 432 S.E.2d 361 (1993).

Stated in Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-39. Partner agent of partnership as to partnership business.

CASE NOTES

Burden of Proof Where Partner Did Not Sign in Name of Partnership. — Where one partner did not sign either a promissory note or mortgage in the name of the alleged partnership, the plaintiff had the burden of showing either that (1) that partner was acting on behalf of the partnership when he executed the note and mortgage and the other partner had authorized his acts, or (2) the other partner, with knowledge of the note and mortgage, ratified his acts. Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

Materialman's Lien Held Superior to Deed of Trust. — Since deed of trust which was recorded did not convey debtor's predecessor's interest in that property, but instead purported to convey the interest of which was an interest which debtor did not have, since the deed was indexed with debtor as grantor and thus was recorded outside of its chain of title and had the same effect on notice as no registration, and since the fact that such deed was signed general partner of actual owner had no effect, materialman's lien was superior to deed of trust. Southeastern Sav. & Loan Ass'n v. Rentenback Constructors, Inc., 114 Bankr. 441 (E.D.N.C. 1989).

§ 59-40. Conveyance of real property of the partnership.

CASE NOTES

Stated in Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

§ 59-43. Partnership bound by partner's wrongful act.

CASE NOTES

Quoted in Heath v. Craighill, Rendleman, Ingle & Blythe, 97 N.C. App. 236, 388 S.E.2d 178 (1990).

§ 59-45. Nature of partner's liability in ordinary partnerships and in registered limited liability partnerships.

(a) Except as provided by subsection (b) of this section, all partners are jointly and severally liable for the acts and obligations of the partnership.

(b) A partner in a registered limited liability partnership is not individually liable for debts and obligations of the partnership arising from errors, omissions, negligence, incompetence, or malfeasance committed in the course of the partnership business by another partner or representative of the partnership not working under the supervision or direction of the first partner at the time the errors, omissions, negligence, incompetence, or malfeasance occurred, unless the first partner was directly involved in the specific activity in which the errors, omissions, negligence, incompetence, or malfeasance were committed by the other partner or representative.

(c) Subsection (b) of this section does not affect any of the following:

(1) The joint and several liability of a partner for debts and obligations of the partnership arising from any cause other than those specified in subsection (b) of this section.

(2) The joint and several liability of a partner for any taxes owed by the partnership under Chapter 105 of the General Statutes or Article 3 of Chapter 119 of the General Statutes.

(3) The liability of partnership assets for partnership debts and obligations. (1941, c. 374, s. 15; 1953, c. 881; 1993, c. 354, s. 4.)

Editor's Note. — Session Laws 1993, c. 354, s. 29 is a severability clause.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, substituted "liability in ordinary partnerships and in registered limited liability partnerships" for "liability" in the title of this section; added the subsection designation (a); in subsection (a) substituted "Except as provided by subsection (b) of this section, all" for "All"; and added subsections (b) and (c).

CASE NOTES

Notice Held Sufficient. — Where defendants, who were general partners, were sued individually, and the prayer for relief asked for enforcement of arbitration award against all defendants jointly and severally, the individual defendants were on notice that plaintiff's complaint sought to hold them individually liable for any award made in the arbitration; with that knowledge, defendants filed an answer requesting that the action be stayed pending determination of the claims in the arbitration proceeding; therefore, defendants were on notice that the arbitration proceeding would affect them individually, and not only as partners, even though the defendants were not named individually in the arbitration proceeding. George W. Kane, Inc. v. Bolin Creek West Assocs., 95 N.C. App. 135, 381 S.E.2d 832 (1989).

Burden of Proof Where Partner Did Not Sign in Name of Partnership. — Where one partner did not sign either a promissory note or mortgage in the name of the alleged partnership, the plaintiff had the burden of showing either that (1) that partner was acting on behalf of the partnership when he executed the note and mortgage and the other partner had authorized his acts, or (2) the other partner, with knowledge of the note and mortgage, ratified his acts. Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

Applied in NCNB Nat'l Bank v. O'Neill, 102 N.C. App. 313, 401 S.E.2d 858 (1991).

Quoted in Hinshaw v. Wright, 105 N.C. App. 158, 412 S.E.2d 138 (1992).

Part 4. Relations of Partners to One Another.

§ 59-48. Rules determining rights and duties of partners.

CASE NOTES

Cited in Jones v. Shoji, 110 N.C. App. 48, 428 S.E.2d 865.

§ 59-51. Partner accountable as a fiduciary.

CASE NOTES

Applicability. — Although this section does not extend a partner's fiduciary duty to actions connected with the formation of the partnership, it expressly applies to "every partner." There is no indication that it applies beyond this context to individuals who agree to but never actually form a partnership. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

Cited in Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

§ 59-52. Right to an account.

CASE NOTES

Applied in Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

Cited in Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

Part 5. Property Rights of a Partner.

§ 59-55. Nature of a partner's right in specific partnership property.

CASE NOTES

Partners Protected by § 45-21.36. — Each partner, though certainly not enjoying the traditional rights of owners, holds a property interest sufficient to invoke the protection of § 45-21.36. If it were otherwise, mortgagees could avoid the requirements of § 45-21.36 when foreclosing on property owned by a partnership simply by suing the partners for a deficiency. NCNB Nat'l Bank v. O'Neill, 102 N.C. App. 313, 401 S.E.2d 858 (1991).

§ 59-56. Nature of partner's interest in the partnership.

CASE NOTES

Partner's Interest Not Subject to Statute of Frauds. — A partner's interest in partnership assets — including real property — is a personal property interest. As such, it is not subject to the statute of frauds. Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

Part 6. Dissolution and Winding Up.

§ 59-59. Dissolution defined.

CASE NOTES

Cited in Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

§ 59-60. Partnership not terminated by dissolution.

CASE NOTES

Cited in Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

§ 59-61. Causes of dissolution.

CASE NOTES

Applied in Cole v. Graves, 101 N.C. App. 396, 399 S.E.2d 136 (1991).

§ 59-62. Dissolution by decree of court.

CASE NOTES

Cited in Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

§ 59-66. Effect of dissolution on partner's existing liability.

CASE NOTES

Cited in Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

§ 59-71. Liability of persons continuing the business in certain cases.

CASE NOTES

Where company did not promise to pay the creditors of a dissolved partnership, it was not liable under subsection (d) of this section. Pendergrass v. Card Care, Inc., 333 N.C. 233, 424 S.E.2d 391 (1993).

ARTICLE 3.

Surviving Partners.

§ 59-84. Settlement otherwise provided for.

CASE NOTES

Quoted in Cole v. Graves, 101 N.C. App. 396, 399 S.E.2d 136 (1991).

ARTICLE 3A.

Miscellaneous Provisions.

§ 59-84.1. Partnership to comply with "assumed name" statute.

Editor's Note. — Session Laws 1993, c. 354, s. 5, effective October 1, 1993, placed existing 59-84.1 in new Article 3A as the first section thereof.

Session Laws 1993, c. 354, s. 29 is a severability clause.

§ 59-84.2. Registered limited liability partnerships.

(a) To become a registered limited liability partnership, a partnership must file with the Secretary of State an application stating the name of the partnership, the address of its principal office, the number of partners, and a brief statement of the business in which the partnership engages. A registration as a registered limited liability partnership must be renewed annually.

(b) An application for registration as a registered limited liability partnership must be executed by a majority in interest of the partners or by one or more partners authorized by a majority in interest of the partners.

(c) An application for registration as a registered limited liability partnership or for renewal of a registration must be accompanied by a fee of one hundred dollars ($100.00).

(d) The Secretary of State shall register or renew the registration of a partnership that submits a completed application with the required fee.

(e) A registration is effective for one year after the date the registration is filed, unless it is voluntarily withdrawn before then by filing with the Secretary of State a written withdrawal notice executed by a majority in interest of the partners or by one or more partners authorized by a majority in interest of the partners.

(f) The Secretary of State may provide forms for applications for registration or renewal of a registration. (1993, c. 354, s. 5.)

Editor's Note. — Session Laws 1993, c. 354, s. 30 made this section effective October 1, 1993.

§ 59-84.3. Name of registered limited liability partnerships.

A registered limited liability partnership's name must contain the words "registered limited liability partnership" or the abbreviation "L.L.P." as the last words or letters of its name. (1993, c. 354, s. 5.)

Editor's Note. — Session Laws 1993, c. 354, s. 30 made this section effective October 1, 1993.

ARTICLE 5.

Revised Uniform Limited Partnership Act.

Part 2. Formation; Certificate of Limited Partnership.

§ 59-204. Execution of certificates.

(a) Each certificate required by this Article to be filed in the office of the Secretary of State shall be executed in the following manner:

(1) An original certificate of limited partnership must be signed by all general partners;

(2) A certificate of amendment must be signed by at least one general partner and by each other partner designated in the certificate as a new general partner; and

(3) A certificate of cancellation must be signed by all general partners.

(b) Any person may sign a certificate by an attorney-in-fact.

(c) The execution of a certificate or amendment by a general partner constitutes an affirmation under the penalties of perjury that the facts stated therein are true. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1991, c. 153, s. 1.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, in subdivision (a)(2) substituted "at least one general partner" for "all general partners."

§ 59-206. Filing requirements.

(a) Whenever the provisions of this Article require any document relating to a limited partnership to be executed and filed in accordance with this Article, unless otherwise specifically stated in this Article:

(1) There shall be an original executed document and also one conformed copy.

(2) The original document so signed, together with the conformed copy, shall be delivered to the Secretary of State. Unless he finds that it does not conform to law, the Secretary of State shall, when the proper fees have been tendered, endorse upon the original the word "filed" and the

hour, day, month and year of the filing thereof and shall file the same in his office. The Secretary of State shall thereupon immediately compare the copy with the original and if he finds that they are identical he shall make upon the conformed copy the same endorsement which appears on the original and shall attach to the copy a certificate stating that attached thereto is a true copy of the document, designated by an appropriate title, filed in his office and showing the date of such filing. He shall thereupon return the copy so certified to the limited partnership or its representatives.

(3) Repealed by Session Laws 1991, c. 153, s. 2, effective October 1, 1991.

(3a) Whenever the name of any domestic or foreign limited partnership holding title to real property in this State is changed upon amendment to the certificate of limited partnership, a certificate reciting such change or transfer shall be recorded in the office of the register of deeds of the county where the property lies, or if the property is located in more than one county, then in each county where any portion of the property lies.

(4) The Secretary of State shall adopt uniform certificates to be furnished for registration in accordance with this section. In the case of a foreign limited partnership, a similar certificate by any competent authority of the jurisdiction under which the limited partnership is organized may be registered in accordance with this section.

(5) The certificate required by this section shall be recorded by the register of deeds in the same manner as deeds, and for the same fees, but no formalities as to acknowledgement, probate, or approval by any other officer shall be required. The former name of the limited partnership holding title to the real property before the amendment shall appear in the "Grantor" index, and the amended name of the limited partnership holding title to the real property by virtue of the amendment shall appear in the "Grantee" index.

(b) Repealed by Session Laws 1991, c. 153, s. 2, effective October 1, 1991.

(b1) Except as provided in subsection (b2), a document accepted for filing is effective:

(1) At the time of filing on the date it is filed, as evidenced by the Secretary of State's date and time endorsement on the original document; or

(2) At the time specified in the document as its effective time on the date it is filed.

(b2) A document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified. If a delayed effective date but not time is specified, the document is effective at 11:59:59 p.m. on that date. A delayed effective date for a document may not be later than the ninetieth day after the date it is filed.

(b3) The fact that a document has become effective under this section does not determine its validity or invalidity or the correctness or incorrectness of the information contained in the document.

(c) It shall be the duty of the Secretary of State, whenever so requested and upon tender of the proper fees, to certify as aforesaid any true copy of any such document on file in his office, or if such be the request, to make or cause to be made typewritten or photostatic copies of such documents and to certify the same as aforesaid. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 5; 1991, c. 153, s. 2.)

Effect of Amendments. — The 1991 amendment, effective, October 1, 1991, substituted "requirements" for "in office of Secretary of State" in the catchline, deleted subdivision (a)(3), relating to the recording of the copy certificate, added subdivisions (a)(3a), (a)(4) and (a)(5), deleted subsection (b), relating to the effective date of documents required to be filed, and added subsections (b1), (b2) and (b3).

Part 11. Miscellaneous.

§ 59-1106. Fees.

The Secretary of State shall collect the following fees and remit them to the State Treasurer for the use of the State:

(1) For filing a certificate of limited partnership (G.S. 59-201)	$50.00
(2) For filing a certificate of amendment (G.S. 59-202; 59-905)	25.00
(3) For filing a certificate of cancellation (G.S. 59-203; 59-906)	25.00
(4) For filing an application for reservation of name (G.S. 59-104(a))	10.00
(5) For filing a transfer of name (G.S. 59-104(d))	10.00
(6) For filing an application for registration as foreign limited partnership (G.S. 59-502)	50.00
(7) For preparing and furnishing a copy of any document, instrument or paper filed or recorded relating to a limited partnership (G.S. 59-206(c))	
For each page	1.00
For affixing his certificate and official seal thereto	5.00
(8) For comparing a copy furnished to him of any document, instrument or paper filed or recorded relating to a limited partnership	
For each page	1.00
(9) For filing any other document not herein specifically provided for	10.00.

(1985 (Reg. Sess., 1986), c. 989, s. 2; 1991, c. 574, s. 3.)

Effect of Amendments. — The 1991 amendment, effective July 8, 1991, in subdivision (7), deleted "For the first page thereof .... 1.00" following "(G.S. 59-206(c))", deleted "additional" following "For each", and substituted "1.00" for ".40" and "5.00" for "2.00", and in subdivision (8) substituted "1.00" for ".20".

Chapter 62.

Public Utilities.

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62-318. (Effective October 1, 1994 — See editor's note) Allowing or accepting rebates a misdemeanor.
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62-325. (Effective October 1, 1994 — See editor's note) Unlawful motor carrier operations.
62-326. (Effective October 1, 1994 — See editor's note) Furnishing false information to the Commission; withholding information from the Commission.
62-327. (Effective October 1, 1994 — See editor's note) Gifts to members of Commission, Commission employees, or public staff.

ARTICLE 1.

General Provisions.

§ 62-2. Declaration of policy.

Upon investigation, it has been determined that the rates, services and operations of public utilities as defined herein, are affected with the public interest and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government of North Carolina is a matter of public policy. It is hereby declared to be the policy of the State of North Carolina:

(1) To provide fair regulation of public utilities in the interest of the public;

(2) To promote the inherent advantage of regulated public utilities;

(3) To promote adequate, reliable and economical utility service to all of the citizens and residents of the State;

(3a) To assure that resources necessary to meet future growth through the provision of adequate, reliable utility service include use of the entire spectrum of demand-side options, including but not limited to conservation, load management and efficiency programs, as additional sources of energy supply and/or energy demand reductions. To that end, to require energy planning and fixing of rates in a manner to result in the least cost mix of generation and demand-reduction measures which is achievable, including consideration of appropriate rewards to utilities for efficiency and conservation which decrease utility bills.

(4) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long-term management and

conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy;

(4a) To assure that facilities necessary to meet future growth can be financed by the utilities operating in this State on terms which are reasonable and fair to both the customers and existing investors of such utilities; and to that end to authorize fixing of rates in such a manner as to result in lower costs of new facilities and lower rates over the operating lives of such new facilities by making provisions in the rate-making process for the investment of public utilities in plant under construction;

(5) To encourage and promote harmony between public utilities, their users and the environment;

(6) To foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of energy needed for the protection of public health and safety and for the promotion of the general welfare as expressed in the State energy policy;

(7) To seek to adjust the rate of growth of regulated energy supply facilities serving the State to the policy requirements of statewide development; and

(8) To cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utility service and reliability of public utility energy supply.

(9) To facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare throughout the State and to that end to authorize the creation of an expansion fund for each natural gas local distribution company to be administered under the supervision of the North Carolina Utilities Commission.

To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in this Chapter. Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission.

Because of technological changes in the equipment and facilities now available and needed to provide telephone and telecommunications services, changes in regulatory policies by the federal government, and changes resulting from the court-ordered divestiture of the American Telephone and Telegraph Company, competitive offerings of certain types of telephone and telecommunications services may be in the public interest. Consequently, authority shall be vested in the North Carolina Utilities Commission to allow competitive offerings of long distance services by public utilities defined in G.S. 62-3(23)a6 and certified in accordance with the provisions of G.S. 62-110.

The policy and authority stated in this section shall be applicable to common carriers of passengers by motor vehicle and their regulation by the North Carolina Utilities Commission only to the extent that they are consistent with the provisions of the Bus Regulatory Reform Act of 1985.

The North Carolina Utilities Commission may develop regulatory policies to govern the provision of telecommunications services to the public which promote efficiency, technological innovation, economic growth, and permit telecommunications utilities a reasonable opportunity to compete in an emerging competitive environment, giving due regard to consumers, stockholders, and maintenance of reasonably affordable local exchange service and long distance service. (1963, c. 1165, s. 1; 1975, c. 877, s. 2; 1977, c. 691, s. 1; 1983 (Reg. Sess., 1984), c. 1043, s. 1; 1985, c. 676, s. 3; 1987, c. 354; 1989, c. 112, s. 1; 1991, c. 598, s. 1.)

Effect of Amendments. —

The 1991 amendment, effective July 8, 1991, added subdivision (9).

CASE NOTES

Delegation of Authority to Commission Constitutional. — The standard of public convenience and necessity and the policies of the State were sufficient to guide the North Carolina Utilities Commission in deciding a certificate of public convenience and necessity case, and the legislature's delegation of this authority to the Commission was not unconstitutional. State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993), cert. denied, 335 N.C. 564, 441 S.E.2d 125 (1994).

The Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

Quoted in State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992).

Cited in State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989).

§ 62-3. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

(1) "Broker," with regard to motor carriers of passengers, means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which as principal or agent engages in the business of selling or offering for sale any transportation of passengers by motor carrier, or negotiates for or holds himself, or itself, out by solicitation, advertisements, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.

(1a) "Bus company" means any common carrier by motor vehicle which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of passengers over fixed routes or in charter operations, or both, except as exempted in G.S. 62-260.

(2) "Certificate" means a certificate of public convenience and necessity issued by the Commission to a public utility or a

certificate of authority issued by the Commission to a bus company.

(3) "Certified mail" means such mail only when a return receipt is requested.

(4) "Charter operations" with regard to bus companies means the transportation of a group of persons for sightseeing purposes, pleasure tours, and other types of special operations, or the transportation of a group of persons who, pursuant to a common purpose and under a single contract, and for a fixed charge for the vehicle, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the place of origin.

(5) "Commission" means the North Carolina Utilities Commission.

(6) "Common carrier" means any person which holds itself out to the general public to engage in transportation of persons or property for compensation, including transportation by train, bus, truck, boat or other conveyance, except as exempted in G.S. 62-260.

(7) "Common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of persons or property or any class or classes thereof for compensation, whether over regular or irregular routes, or in charter operations, except as exempted in G.S. 62-260.

(8) "Contract carrier by motor vehicle" means any person which, under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation other than the transportation referred to in subdivision (7) of this section, by motor vehicle of persons or property in intrastate commerce for compensation, except as exempted in G.S. 62-260.

(9) "Contract carrier" means any person which under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation of persons or property for compensation, except as exempted in G.S. 62-260.

(9a) "Fixed route" means the specific highway or highways over which a bus company is authorized to operate between fixed termini.

(10) "Foreign commerce" means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country.

(11) "Franchise" means the grant of authority by the Commission to any person to engage in business as a public utility or contract carrier, whether or not exclusive or shared with others or restricted as to terms and conditions and whether described by area or territory or not, and includes certificates and permits, and all other forms of licenses or orders and decisions granting such authority.

(12) "Highway" means any road or street in this State used by the public or dedicated or appropriated to public use.

(13) "Industrial plant" means any plant, mill, or factory engaged in the business of manufacturing.

(14) "Interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state.

(15) "Intrastate commerce" means commerce between points and over a route or within a territory wholly within this State, which commerce is not a part of a prior or subsequent movement to or from points outside of this State in interstate or foreign commerce, and includes all transportation within this State for compensation in interstate or foreign commerce which has been exempted by Congress from federal regulation.

(16) "Intrastate operations" means the transportation of persons or property for compensation in intrastate commerce.

(17) "Motor carrier" means both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(18) "Motor vehicle" means any vehicle, machine, tractor, semi-trailer, or any combination thereof, which is propelled or drawn by mechanical power and used upon the highways within the State.

(19) "Municipality" means any incorporated community, whether designated in its charter as a city, town, or village.

(20) "Permit" means a permit issued by the Commission pursuant to the provisions of this Chapter to a contract carrier by motor vehicle.

(21) "Person" means a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, lessee, or personal representative thereof.

(22) "Private carrier" means any person not included in the definitions of common carrier or contract carrier, which transports in intrastate commerce in its own vehicle or vehicles property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or when such transportation is purely an incidental adjunct to some other established private business owned and operated by such person other than the transportation of property for compensation.

(23) a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:

1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is for such person's own use and not for the primary purpose of producing elec-

tricity, heat, or steam for sale to or for the public for compensation.

2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation; provided, however, that the term "public utility" shall not include any person or company whose sole operation consists of selling water to less than 10 residential customers, except that any person or company which constructs a water system in a subdivision with plans for 10 or more lots and which holds itself out by contracts or other means at the time of said construction to serve an area containing more than 10 residential building lots shall be a public utility at the time of such planning or holding out to serve such 10 or more building lots, without regard to the number of actual customers connected;

3. Transporting persons or property by street, suburban or interurban bus or railways for the public for compensation;

4. Transporting persons or property by railways or motor vehicles, or any other form of transportation or express service for the public for compensation, except motor carriers exempted in G.S. 62-260, and except carriers by air;

5. Transporting or conveying gas, crude oil or other fluid substance by pipeline for the public for compensation;

6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation.

b. The term "public utility" shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

c. The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation as defined in G.S. 55-2 to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

d. The term "public utility," except as otherwise expressly provided in this Chapter, shall not include a municipality, an authority organized under the North Carolina Water and Sewer Authorities Act, electric or telephone membership corporation or nonprofit water membership or consumer-owned corporations financed by the Farmers Home Administration, the United States Department of Housing and Urban Development, or any similar or successor federal financing agency, provided, that (i) any such financing administration, department or agency exercise substantial control over and regulation of any such corporation's rates and terms and conditions of service, and (ii) the members or consumer-owners of any such corporation, pursuant to the corporation's articles of incorporation and bylaws, shall elect the governing board of the corporation; or any person not otherwise a public utility who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others; provided, however, that any person other than a nonprofit organization serving only its members, who distributes or provides utility service to his employees or tenants by individual meters or by other coin-operated devices with a charge for metered or coin-operated utility service shall be a public utility within the definition and meaning of this Chapter with respect to the regulation of rates and provisions of service rendered through such meter or coin-operated device imposing such separate metered utility charge. If any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter. A water or sewer system owned by a homeowners' association that provides water or sewer service only to members or leaseholds of members is not subject to the provisions of this Chapter.

e. The term "public utility" shall include the University of North Carolina insofar as said University supplies telephone service, electricity or water to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9).

f. The term "public utility" shall include the Town of Pineville insofar as said town supplies telephone services to the public for compensation. The territory to be served by the Town of Pineville in furnishing telephone services, subject to the Public Utilities Act, shall include the town limits as they exist on May 8, 1973, and shall also include the area proposed to be annexed under the town's ordinance adopted May 3, 1971, until January 1, 1975.

g. The term "public utility" shall not include a hotel, motel, time share or condominium complex operated primarily to serve transient occupants, which imposes charges to occupants for local, long-distance, or wide area telecommunication services when such calls are completed through the use of facilities provided by a public utility, and provided further that the local services received are rated in accordance with the provisions of G.S. 62-110(d) and the applicable charges for telephone calls are prominently displayed in each area where occupant rooms are located.

h. The term "public utility" shall not include the resale of electricity by (i) a campground operated primarily to serve transient occupants, or (ii) a marina; provided that (i) the campground or marina charges no more than the actual cost of the electricity supplied to it, (ii) the amount of electricity used by each campsite or marina slip occupant is measured by an individual metering device, (iii) the applicable rates are prominently displayed at or near each campsite or marina slip, and (iv) the campground or marina only resells electricity to campsite or marina slip occupants.

i. The term "public utility" shall not include the State, the Office of the State Controller, or the Microelectronics Center of North Carolina in the provision or sharing of switched broadband telecommunications services with non-State entities or organizations of the kind or type set forth in G.S. 143B-426.39.

(24) "Rate" means every compensation, charge, fare, tariff, schedule, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, tariff, schedule, toll, rental or classification.

(25) "Route" means the course or way which is traveled; the road or highway over which motor vehicles operate.

(26) "Securities" means stock, stock certificates, bonds, notes, debentures, or other evidences of ownership or of indebtedness, and any assumption or guaranty thereof.

(27) "Service" means any service furnished by a public utility, including any commodity furnished as a part of such service and any ancillary service or facility used in connection with such service.

(27a) "Small power producer" means a person or corporation owning or operating an electrical power production facility with a power production capacity which, together with any other facilities located at the same site, does not exceed 80 megawatts of electricity and which depends upon renewable resources for its primary source of energy. For the purposes of this section, renewable resources shall mean: hydroelectric power. A small power producer shall not include persons primarily engaged in the generation or sale of electricity from other than small power production facilities.

(28) The word "State" means the State of North Carolina; "state" means any state.

(29) "Town" means any unincorporated community or collection of people having a geographical name by which it may be generally known and is so generally designated.

(30) "Panel" means a panel of three commissioners, a division of the Utilities Commission authorized for the purpose of carrying out certain functions of the Commission. (1913, c. 127, s. 7; C.S., s. 1112(b); 1933, c. 134, ss. 3, 8; c. 307, s. 1; 1937, c. 108, s. 2; 1941, cc. 59, 97; 1947, c. 1008, s. 3; 1949, c. 1132, s. 4; 1953, c. 1140, s. 1; 1957, c. 1152, s. 13; 1959, c. 639, ss. 12, 13; 1963, c. 1165, s. 1; 1967, c. 1094, ss. 1, 2; 1971, c. 553; c. 634, s. 1; cc. 894, 895; 1973, c. 372, s. 1; 1975, c. 243, s. 2; cc. 254, 415; 1979, c. 652, s. 1; 1979, 2nd Sess., c. 1219, s. 1; 1981 (Reg. Sess., 1982), c. 1186, s. 2; 1985, c. 676, s. 4; 1987, c. 445, s. 2; 1989, c. 110; 1993, c. 349, s. 1; 1993 (Reg. Sess., 1994), c. 777, s. 1(b).)

Editor's Note. — Chapter 55, referred to in subdivision (23)c of this section, was rewritten, effective July 1, 1990. For definitions applicable to that chapter, see now § 55-1-40.

Effect of Amendments. — The 1993 amendment, effective July 15, 1993, added subdivision (23)h.

The 1993 (Reg. Sess., 1994) amendment, effective July 17, 1994, added subdivision (23)i.

CASE NOTES

In determining the scope of the Commission's authority, the emphasis should be placed on the public utility function rather than a literal reading of the statutory definition of "public utility," and the statutory definition should not be read so narrowly as to preclude commission's jurisdiction over a function which is required to provide adequate service to the subscribers. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

As to what constitutes a contract carrier, etc. —

A company which offers white-water rafting excursions is not a common carrier, because any "transportation" was merely incidental to primary purpose of outdoor adventure, camaraderie, excitement and thrills. Beavers v. Federal Ins. Co., 113 N.C. App. 254, 437 S.E.2d 881 (1994).

Cited in In re Lower Cape Fear Water & Sewer Auth., 329 N.C. 675, 407 S.E.2d 155 (1991); State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992); State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993); Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

ARTICLE 2.

Organization of Utilities Commission.

§ 62-10. Number; appointment; terms; qualifications; chairman; vacancies; compensation; other employment prohibited.

(a) The North Carolina Utilities Commission shall consist of seven commissioners who shall be appointed by the Governor subject to confirmation by the General Assembly by joint resolution. The names of commissioners to be appointed by the Governor shall be submitted by the Governor to the General Assembly for confirmation by the General Assembly on or before May 1, of the year in which the terms for which the appointments are to be made are to expire. Upon failure of the Governor to submit names as herein provided, the Lieutenant Governor and Speaker of the House jointly shall submit the names of a like number of commissioners to the General Assembly on or before May 15 of the same year for confirmation by the General Assembly. Regardless of the way in which names of commissioners are submitted, confirmation of commissioners must be accomplished prior to adjournment of the then current session of the General Assembly. This subsection shall be subject to the provisions of subsection (c) of this section.

(b) The terms of the commissioners now serving shall expire at the conclusion of the term for which they were appointed which shall remain as before with two regular eight-year terms expiring on July 1 of each fourth year after July 1, 1965, and the fifth term expiring on July 1 of each eighth year after July 1, 1963. The terms of office of utilities commissioners thereafter shall be eight years commencing on July 1 of the year in which the predecessor terms expired, and ending on July 1 of the eighth year thereafter.

(c) In order to increase the number of commissioners to seven, the names of two additional commissioners shall be submitted to the General Assembly on or before May 27, 1975, for confirmation by the General Assembly as provided in G.S. 62-10(a). The commissioners so appointed and confirmed shall serve new terms commencing on July 1, 1975, one of which shall be for a period of two years (with the immediate successor serving for a period of six years), and one of which shall be for a period of two years.

Thereafter, the terms of office of the additional commissioners shall be for eight years as provided in G.S. 62-10(b).

(d) A commissioner in office shall continue to serve until his successor is duly confirmed and qualified but such holdover shall not affect the expiration date of such succeeding term.

(e) On July 1, 1965, and every four years thereafter, one of the commissioners shall be designated by the Governor to serve as chairman of the Commission for the succeeding four years and until his successor is duly confirmed and qualifies. Upon death or resignation of the commissioner appointed as chairman, the Governor shall designate the chairman from the remaining commissioners and appoint a successor as hereinafter provided to fill the vacancy on the Commission.

(f) In case of death, incapacity, resignation or vacancy for any other reason in the office of any commissioner prior to the expiration of his term of office, the name of his successor shall be submitted by the Governor within four weeks after the vacancy arises to the General Assembly for confirmation by the General Assembly. Upon failure of the Governor to submit the name of the successor, the Lieutenant Governor and Speaker of the House jointly shall submit the name of a successor to the General Assembly within six weeks after the vacancy arises. Regardless of the way in which names of commissioners are submitted, confirmation of commissioners must be accomplished prior to the adjournment of the then current session of the General Assembly.

(g) If a vacancy arises or exists pursuant to either subsection (a) or (c) or (f) of this section when the General Assembly is not in session, and the appointment is deemed urgent by the Governor, the commissioner may be appointed and serve on an interim basis pending confirmation by the General Assembly.

(h) The salary of each commissioner and that of the commissioner designated as chairman shall be set by the General Assembly in the Current Operations Appropriations Act. In lieu of merit and other increment raises paid to regular State employees, each commissioner, including the commissioner designated as chairman, shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. "Service" means service as a member of the Utilities Commission.

(i) The standards of judicial conduct provided for judges in Article 30 Chapter 7A of the General Statutes shall apply to members of the Commission. Members of the Commission shall be liable to impeachment for the causes and in the manner provided for judges of the General Court of Justice in Chapter 123 of the General Statutes. Members of the Commission shall not engage in any other employment, business, profession, or vocation while in office.

(j) Members of the Commission shall be reimbursed for travel and subsistence expenses at the rates allowed to State officers and employees by G.S. 138-6(a). (1941, c. 97, s. 2; 1949, c. 1009, s. 1; 1959, c. 1319; 1963, c. 1165, s. 1; 1967, c. 1238; 1975, c. 243, s. 3; c. 867, ss. 1, 2; 1977, c. 468, s. 1; c. 913, s. 2; 1983 (Reg. Sess., 1984), c. 1116, s. 91; 1989, c. 781, s. 41.2; 1993 (Reg. Sess., 1994), c. 769, s. 7.4(b).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. —

The 1993 (Reg. Sess., 1994) amendment, effective July 1, 1994, substituted "and that of the commissioner designated as chairman shall be set by the General Assembly in the Current Operations Appropriations Act" for "shall be the same as that fixed from time to time for judges of the superior court except that the commissioner designated as chairman shall receive one thousand dollars ($1,000) additional per annum" in the first sentence of subsection (h).

§ 62-15. Office of executive director; public staff, structure and function.

(a) There is established in the Commission the office of executive director, whose salary shall be the same as that fixed for members of the Commission. The executive director shall be appointed by the Governor subject to confirmation by the General Assembly by joint resolution. The name of the executive director appointed by the Governor shall be submitted to the General Assembly on or before May 1 of the year in which the term of his office begins. The term of office for the executive director shall be six years, and the initial term shall begin July 1, 1977. The executive director may be removed from office by the Governor in the event of his incapacity to serve; and the executive director shall be removed from office by the Governor upon the affirmative recommendation of a majority of the Commission, after consultation with the Joint Legislative Utility Review Committee of the General Assembly. In case of a vacancy in the office of executive director for any reason prior to the expiration of his term of office, the name of his successor shall be submitted by the Governor to the General Assembly, not later than four weeks after the vacancy arises. If a vacancy arises in the office when the General Assembly is not in session, the executive director shall be appointed by the Governor to serve on an interim basis pending confirmation by the General Assembly.

(b) There is established in the Commission a public staff. The public staff shall consist of the executive director and such other professional, administrative, technical, and clerical personnel as may be necessary in order for the public staff to represent the using and consuming public, as hereinafter provided. All such personnel shall be appointed, supervised, and directed by the executive director. The public staff shall not be subject to the supervision, direction, or control of the Commission, the chairman, or members of the Commission.

(c) Except for the executive director, the salaries and compensation of all such personnel shall be fixed in the manner provided by law for fixing and regulating salaries and compensation by other State agencies.

(d) It shall be the duty and responsibility of the public staff to

(1) Review, investigate, and make appropriate recommendations to the Commission with respect to the reasonableness of rates charged or proposed to be charged by any public utility and with respect to the consistency of such rates with the public policy of assuring an energy supply adequate to protect the public health and safety and to promote the general welfare;
(2) Review, investigate, and make appropriate recommendations to the Commission with respect to the service furnished, or proposed to be furnished by any public utility;
(3) Intervene on behalf of the using and consuming public, in all Commission proceedings affecting the rates or service of any public utility;
(4) When deemed necessary by the executive director in the interest of the using and consuming public, petition the Commission to initiate proceedings to review, investigate, and take appropriate action with respect to the rates or service of public utilities;
(5) Intervene on behalf of the using and consuming public in all certificate applications filed pursuant to the provisions of G.S. 62-110.1, and provide assistance to the Commission in making the analysis and plans required pursuant to the provisions of G.S. 62-110.1 and 62-155;
(6) Intervene on behalf of the using and consuming public in all proceedings wherein any public utility proposes to reduce or abandon service to the public;
(7) Investigate complaints affecting the using and consuming public generally which are directed to the Commission, members of the Commission, or the public staff and where appropriate make recommendations to the Commission with respect to such complaints;
(8) Make studies and recommendations to the Commission with respect to standards, regulations, practices, or service of any public utility pursuant to the provisions of G.S. 62-43; provided, however, that the public staff shall have no duty, responsibility, or authority with respect to the enforcement of natural gas pipeline safety laws, rules, or regulations;
(9) When deemed necessary by the executive director, in the interest of the using and consuming public, intervene in Commission proceedings with respect to transfers of franchises, mergers, consolidations, and combinations of public utilities pursuant to the provisions of G.S. 62-111;
(10) Investigate and make appropriate recommendations to the Commission with respect to applications for certificates by radio common carriers, pursuant to the provisions of Article 6A of this Chapter;
(11) Review, investigate, and make appropriate recommendations to the Commission with respect to contracts of public utilities with affiliates or subsidiaries, pursuant to the provisions of G.S. 62-153;
(12) When deemed necessary by the executive director, in the interest of the using and consuming public, advise the

Commission with respect to securities, regulations, and transactions, pursuant to the provisions of Article 8 of this Chapter.

(e) The public staff shall have no duty, responsibility, or authority with respect to the laws, rules or regulations pertaining to the physical facilities or equipment of common, contract and exempt carriers, the registration of vehicles or of insurance coverage of vehicles of common, contract and exempt carriers; the licensing, training, or qualifications of drivers or other persons employed by common, contract and exempt carriers, or the operation of motor vehicle equipment by common, contract and exempt carriers in the State.

(f) The executive director representing the public staff shall have the same rights of appeal from Commission orders or decisions as other parties to Commission proceedings.

(g) Upon request, the executive director shall employ the resources of the public staff to furnish to the Commission, its members, or the Attorney General, such information and reports or conduct such investigations and provide such other assistance as may reasonably be required in order to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation.

(h) The executive director is authorized to employ, subject to approval by the State Budget Officer, expert witnesses and such other professional expertise as the executive director may deem necessary from time to time to assist the public staff in its participation in Commission proceedings, and the compensation and expenses therefor shall be paid by the utility or utilities participating in said proceedings. Such compensation and expenses shall be treated by the Commission, for rate-making purposes, in a manner generally consistent with its treatment of similar expenditures incurred by utilities in the presentation of their cases before the Commission. An accounting of such compensation and expenses shall be reported annually to the Joint Legislative Utility Review Committee and to the Speaker of the House of Representatives and the President Pro Tempore of the Senate.

(i) The executive director, within established budgetary limits, and as allowed by law, shall authorize and approve travel, subsistence, and related necessary expenses of the executive director or members of the public staff, incurred while traveling on official business. (1949, c. 1009, s. 3; 1963, c. 1165, s. 1; 1977, c. 468, s. 4; 1981, c. 475; 1983, c. 717, s. 12.1; 1985, c. 499, s. 4; 1989, c. 781, s. 41.3; 1989 (Reg. Sess., 1990), c. 1024, s. 13.)

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective July 27, 1990, inserted "Joint Legislative" in the last sentence of subsection (h).

CASE NOTES

Cited in Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

§ 62-23. Commission as an administrative board or agency.

CASE NOTES

Benefits of 1986 Tax Reform Act to Ratepayers through Rule Making Procedure. — The Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

ARTICLE 3.

Powers and Duties of Utilities Commission.

§ 62-30. General powers of Commission.

CASE NOTES

Benefits of 1986 Tax Reform Act to Ratepayers through Rule Making Procedure. — The Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

Incorrect Telephone Number Listings. — The Utilities Commission had jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory even when the regulated utility had delegated to another company the public utility function of publishing its directory which also included paid advertising. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Proper Listings in Advertisements in Yellow Pages. — If a utility elects to include yellow pages advertising in the directory which it is required to publish, then clearly proper listings in the advertisements in the yellow pages become a part of the utility's "function of providing adequate service" to the public. The public is not well served by listings in the yellow pages or the white pages of the directory which are incorrect or confusing to the consuming public. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Providing a correct telephone listing in the yellow pages as well as in the white pages of the directory is a utility function, and the Commission properly has jurisdiction over complaints which arise from this function. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

§ 62-31. Power to make and enforce rules and regulations for public utilities.

CASE NOTES

Tax Reform Benefits Passed on to Ratepayers by Rulemaking Rather Than Ratemaking Procedure. — Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 (TRA-86) through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

Cited in State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993).

§ 62-36A. Natural gas planning.

(a) The Commission shall require each franchised natural gas local distribution company to file reports with the Commission detailing its plans for providing natural gas service in areas of its franchise territory in which natural gas service is not available. Commission rules shall require that each local distribution company shall update its report at least every two years.

(b) The Commission shall develop rules to carry out the intent of subsection (a) of this section, and to produce an orderly system for reviewing current levels of natural gas service and planning the orderly expansion of natural gas service to areas not served.

(c) Within 180 days after all local distribution companies have filed their initial or biennial update reports, the Commission and the Public Staff shall independently provide analyses and summaries of those reports, together with status reports of natural gas service in the State, to the Joint Legislative Utility Review Committee. (1989, c. 338, s. 1; 1993 (Reg. Sess., 1994), c. 560, s. 1.)

Cross References. — As to current provisions relating to natural gas expansion, see § 62-158. As to current provisions relating to gas cost adjustment for natural gas local distribution companies, see § 62-133.4.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective June 13, 1994, in subsection (a) deleted the second sentence, which read "Initial reports shall be filed at a time set by the Commission, but not later than January 1, 1990"; and in subsection (c) substituted "180" for "120".

§ 62-36B. Regulation of natural gas service agreements.

Whenever the Commission, after notice and hearing, finds that additional natural gas service agreements (including "backhaul" agreements) with interstate or intrastate pipelines will provide increased competition in North Carolina's natural gas industry and (i) will likely result in lower costs to consumers without substantially increasing the risks of service interruptions to customers, or (ii) will substantially reduce the risks of service interruptions without unduly increasing costs to consumers, the Commission may enter and serve an order directing the franchised natural gas local distribution company to negotiate in good faith to enter into such service agreements within a reasonable time. In considering costs to consumers under this section, the Commission may consider both short-term and long-term costs. (1989 (Reg. Sess., 1990), c. 962, s. 5.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 962, s. 6 made this section effective upon ratification. The act was ratified July 18, 1990.

§ 62-42. Compelling efficient service, extensions of services and facilities, additions and improvements.

CASE NOTES

Proposed Siting of Electrical Transmission Line. — North Carolina Utilities Commission had jurisdiction to hear and resolve dispute arising from the proposed siting of an electrical transmission line against electric membership corporations. State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992), aff'd per curiam, 334 N.C. 681, 435 S.E.2d 71 (1993). Decided prior to effective date of § 62-100, et seq.

Providing a correct telephone listing is part of providing "reasonably adequate service" as required by subdivision (a)(5) of this section. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Providing a correct telephone listing in the yellow pages as well as in the white pages of the directory is a utility function, and the Commission properly has jurisdiction over complaints which arise from this function. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Incorrect Telephone Number Listings. — The Utilities Commission had jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory even when the regulated utility had delegated to another company the public utility function of publishing its directory which also included paid advertising. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Proper Listings in Advertisements in Yellow Pages. — If a utility elects to include yellow pages advertising in the directory which it is required to publish, then clearly proper listings in the advertisements in the yellow pages become a part of the utility's "function of providing adequate service" to the public. The public is not well served by listings in the yellow pages or the white pages of the directory which are incorrect or confusing to the consuming public. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Quoted in State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

§ 62-50. Safety standards for gas pipeline facilities.

(a) The Commission may promulgate and adopt safety standards for the operation of natural gas pipeline facilities in North Carolina. These safety standards shall apply to the pipeline facilities of gas utilities and pipeline carriers under franchise from the Utilities Commission and to pipeline facilities of other gas operators, as defined in subsection (g) of this section. The Commission shall require that all gas operators file with the Commission reports of all accidents occurring in connection with the operation of their gas pipeline facilities located in North Carolina. The Commission may require that all gas operators file with the Commission copies of their construction, operation, and maintenance standards and procedures, and any amendments thereto, and such other information as may be necessary to show compliance with the safety standards promulgated by the Commission. Where the Commission has reason to believe that any gas operator is not in compliance with the Commission's safety standards, the Commission may, after notice and hearing, order that gas operator to take such measures as may be necessary to comply with the standards. The Commission may require all gas operators to furnish engineering reports showing that their pipeline facilities are in safe operating condition and are being operated in conformity with the Commission's safety standards.

(b) The Commission is hereby authorized to enter into agreements with the United States Department of Transportation and other federal agencies and with other states or public utilities commissions of other states for the regulation of natural gas pipelines located within the State of North Carolina and upon the execution of such cooperative agreements, the Commission is authorized to utilize Commission personnel for inspection, investigation, and regulation of safety standards for interstate and intrastate natural gas pipelines in North Carolina, and to share in the cost of such regulation with other agencies having duties with respect to the regulation of said natural gas pipelines, and to receive funds from the United States Department of Transportation for such regulation. The Commission may use Commission personnel to inspect and investigate all gas incidents, facilities, and records kept pursuant to the provisions of 49 Code of Federal Regulations, Parts 191, 192, and 193, and to cooperate with other state and federal agencies in determining the probable cause or causes of gas incidents. Any information obtained during an investigation of a gas incident shall be reduced to writing and a report containing that information shall be filed with the Chief Clerk of the Commission and the report shall be subject to public inspection but the report shall not be admissible in evidence in any civil or criminal proceeding arising from the incident.

(c) The Utilities Commission is hereby authorized to enter into cooperative agreements for inspection of all natural gas pipelines of North Carolina to the end that the Utilities Commission may enter into agreements with the United States Department of Transportation or other federal or state agencies to regulate and inspect the safety standards for all natural gas pipelines in the State of North Carolina, including interstate natural gas pipelines.

(d) Any person who violates any provision of this section, or any regulation of the Utilities Commission issued thereunder, shall be subject to a civil penalty for each violation for each day that the violation continues. The maximum penalty for each day of a violation and for all the days of a continuing violation may not exceed the maximum penalties that would apply if the penalties had been imposed under 49 U.S.C. Appx. § 1679a(a) by the Secretary of the United States Department of Transportation. Penalties assessed under this subsection shall be credited to the General Fund as nontax revenue.

(e) Any action for civil penalty or any claim for said penalty may be compromised by the Utilities Commission and settled for an agreed amount. In determining the amount of the penalty imposed in civil action, or the amount agreed upon in compromise, the amount of the penalty shall be considered in relation to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after any prior notification of a violation. The amount of the penalty, when finally determined in a civil action, or the amount agreed upon in compromise, may be deducted from any sums owing by the State to the person charged, or may be collected as in the case of any judgment in a civil action in the State courts.

(f) The General Court of Justice of North Carolina is authorized to issue court orders, restraining orders, injunctions and other processes of the court in actions by the Utilities Commission to enforce the provisions of this Chapter relating to gas pipeline safety, and the Commission is authorized to bring actions in said court, including actions for mandatory injunctions, restraining orders, temporary restraining orders, penalties, damages and such other relief as may be necessary to secure compliance with the provisions of this section and regulations of the Commission duly enacted and adopted hereunder relating to gas pipeline safety. This provision is in addition to other powers of the Commission and the courts in relation to the enforcement of provisions of this Chapter in the courts, and shall not limit the present powers of the Commission in bringing actions in the courts for enforcement of other provisions of this Chapter.

(g) For the purpose of this section, "gas operators" include gas utilities and gas pipeline carriers operating under a franchise from the Utilities Commission, municipal corporations operating municipally owned gas distribution systems, and public housing authorities and any person operating apartment complexes or mobile home parks that distribute or submeter natural gas to their tenants. This section does not confer any other jurisdiction over municipally owned gas distribution systems, public housing authorities or persons operating apartment complexes or mobile home parks. (1967, c. 1134, s. 1; 1969, c. 646; 1971, cc. 549, 1145; 1979, c. 269, s. 1; 1989, c. 481, ss. 1, 2; 1993, c. 189, s. 1.)

Effect of Amendments. — The 1993 amendment, effective June 21, 1993, in subsection (d), in the first sentence, deleted "not to exceed ten thousand dollars ($10,000)" preceding "for each violation" and substituted "continues" for "persists, the maximum civil penalty not to exceed five hundred thousand dollars ($500,000) for any continuing violation"; and added the second and third sentences.

ARTICLE 4.

Procedure before the Commission.

§ 62-60. Commission acting in judicial capacity; administering oaths and hearing evidence; decisions; quorum.

CASE NOTES

Quoted in Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

Cited in State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993).

§ 62-65. Rules of evidence; judicial notice.

CASE NOTES

Admission of Expert-Opinion Evidence. —

Expert testimony regarding effect of transfer of utility service area was admissible pursuant to this section and the Utilities Commission erred by excluding this testimony. Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

§ 62-66. Depositions.

CASE NOTES

Cited in Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

§ 62-69. Stipulations and agreements; prehearing conference.

CASE NOTES

Cited in Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

§ 62-70. Ex parte communications.

CASE NOTES

Applied in State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990).

§ 62-73. Complaints against public utilities.

CASE NOTES

In determining the scope of the Commission's authority, the emphasis should be placed on the public utility function rather than a literal reading of the statutory definition of "public utility," and the statutory definition should not be read so narrowly as to preclude commission jurisdiction over a function which is required to provide adequate service to the subscribers. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Providing a correct telephone listing in the yellow pages as well as in the white pages of the directory is a utility function, and the Commission properly has jurisdiction over complaints which arise from this function. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Incorrect Telephone Number Listings. — The Utilities Commission had jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory even when the regulated utility had delegated to another company the public utility function of publishing its directory which also included paid advertising. State ex rel. Utils. Comm'n v. Southern Bell Tel.

& Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Proper Listings in Advertisements in Yellow Pages. — If a utility elects to include yellow pages advertising in the directory which it is required to publish, then clearly proper listings in the advertisements in the yellow pages become a part of the utility's "function of providing adequate service" to the public. The public is not well served by listings in the yellow pages or the white pages of the directory which are incorrect or confusing to the consuming public. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Quoted in State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992).

§ 62-78. Proposed findings, briefs, exceptions, orders, expediting cases, and other procedure.

CASE NOTES

Improper Appeal. — To allow an appeal from a recommended order to which no exception has been taken and which has become the final order of the full Commission by operation of the statute would allow a party, in effect, to "bypass" the full Commission, usurping the administrative agency's authority. State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

§ 62-79. Final orders and decisions; findings; service; compliance.

CASE NOTES

Applied in Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

Quoted in State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

§ 62-80. Powers of Commission to rescind, alter or amend prior order or decision.

CASE NOTES

Applied in State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

§ 62-81. Special procedure in hearing and deciding rate cases.

CASE NOTES

Applied in State ex rel. Utils. Comm'n v. Thornburg, 324 N.C. 478, 380 S.E.2d 112 (1989).

§ 62-82. Special procedure on application for certificate for generating facility; appeal from award order.

CASE NOTES

Scope of Commission's Authority and Jurisdiction. — North Carolina Utilities Commission's dismissal of petitioner independent power producer's application and its establishment of minimum filing requirements did not constitute an impermissible deviation from the process specifically provided in this section and § 62-110.1, and some deviation from these sections was not beyond the Commission's authority and jurisdiction. State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993), cert. denied, 335 N.C. 564, 441 S.E.2d 125 (1994).

ARTICLE 5.

Review and Enforcement of Orders.

§ 62-90. Right of appeal; filing of exceptions.

CASE NOTES

I. In General.

I. IN GENERAL.

Who May Appeal. —

In order to have standing to appeal under this section, a party must not only file notice of appeal within 30 days, but must also be aggrieved. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 104 N.C. App. 216, 408 S.E.2d 876 (1991), cert. denied, 330 N.C. 618, 412 S.E.2d 95 (1992).

Utility customers association was not an aggrieved party entitled to appeal an order of the Utilities Commission adopting a ratemaking formula which authorized a natural gas company to adjust its rates when it purchased gas from nontraditional sources. Contention that association was an aggrieved party because the order would allow gas company to increase its rates in the future to the extent necessary to offset previous reductions under the order was without merit. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 104 N.C. App. 216, 408 S.E.2d 876 (1991), cert. denied, 330 N.C. 618, 412 S.E.2d 95 (1992).

Applied in State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 111 N.C. App. 251, 431 S.E.2d 880 (1993); State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

Cited in State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 106 N.C. App. 218, 415 S.E.2d 758 (1992).

§ 62-94. Record on appeal; extent of review.

CASE NOTES

I. In General.
II. Standard of Review.
III. Limitations on Review.
  A. In General.
  B. Weighing of Evidence.

IV. Prima Facie Just and Reasonable.
  A. In General.
  B. Rates.
  C. Findings.
  D. Determinations.
  E. Orders.
V. Cases Decided Prior to 1949 Revision of Procedural Sections.

I. IN GENERAL.

Editor's Note. *— The annotations that were previously carried under this section in the main volume and the 1990 Cumulative Supplement, along with annotations taken since the publication thereof, have been edited and reprinted below so as to accommodate new analysis lines.*

The Utilities Commission is a creature of the legislature and may exercise jurisdiction and regulatory authority only as defined by Chapter 62. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 93 N.C. App. 260, 377 S.E.2d 772 (1989), rev'd on other grounds, 326 N.C. 522, 391 S.E.2d 487 (1990).

Subsection (b) States Authority of Court. — The authority of the court to which an appeal is taken from an order of the Utilities Commission is stated in subsection (b) of this section. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Subsection (b) gives the Supreme Court ample basis for ordering refunds to ratepayers who have been charged unlawfully high rates. Therefore, the Supreme Court is authorized to order refunds when the Commission has made an error of law in its rate making procedures. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

Questions on appeal from the Commission must be determined from the record certified by it. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

The Commission has the duty to enter final orders that are sufficient in detail to enable the Supreme Court on appeal to determine the controverted issues. State ex rel. Utils. Comm'n v. AT & T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

Unless Facts Are in Record, Commission's Expert Knowledge Cannot Be Considered. — The Commission's knowledge, however expert, cannot be considered by the Supreme Court on appeal unless the facts embraced within that knowledge are in the record. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Attorney General Not Prejudiced by Failure to Hold Hearing. — The Attorney General was not prejudiced by the action of the Commission in allowing an exploration tracking rate increase to go into effect without a hearing, since a refund could be sought under this section. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Contents of Order Remanding Cause. — If a cause is remanded under this section, the order should specify the ground on which it is based and thereby indicate to the Commission the nature of its further proceedings. State ex rel. Utils. Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960).

Doctrine of Res Judicata. — Where an administrative determination has been reviewed by the courts, the res judicata effect, if any, attaches to the court's judgment rather than to the administrative decision. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Applied in State ex rel. Utils. Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963); State ex rel. N.C. Utils. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210 (1966); State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977); In re Duke Power Co., 37 N.C. App. 138, 245 S.E.2d 787 (1978); State ex rel. Utils. Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234 (1980); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988); State ex rel. Utils. Comm'n v. North Carolina Natural Gas Corp., 323 N.C. 630, 375 S.E.2d 147 (1989); State ex rel.

Utils. Comm'n v. Thornburg, 324 N.C. 478, 380 S.E.2d 112 (1989); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989); State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990); State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

Quoted in State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 61 N.C. App. 42, 300 S.E.2d 395 (1983); State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986); State ex rel. Utils. Comm'n v. Thornburg, 84 N.C. App. 482, 353 S.E.2d 413 (1987).

Stated in State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966); State ex rel. Utils. Comm'n v. North Carolina Cellular Ass'n, 111 N.C. App. 801, 433 S.E.2d 785 (1993).

Cited in State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968); State ex rel. Utils. Comm'n v. Public Serv. Co., 35 N.C. App. 156, 241 S.E.2d 79 (1978); In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979); State ex rel. Utils. Comm'n v. Central Tel. Co., 60 N.C. App. 493, 299 S.E.2d 264 (1983); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983); State ex rel. Utils. Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985); Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990); State ex rel. Utils. Comm'n v. Water Serv., Inc., 328 N.C. 299, 401 S.E.2d 353 (1991); State ex rel. Utilities Comm'n v. Centel Cellular Co., 103 N.C. App. 731, 407 S.E.2d 257 (1991); State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993).

II. STANDARD OF REVIEW.

Standard that governs appellate review of Commission orders is statutorily articulated by subsections (b) and (c) of this section. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Commission's Decision Will Be Upheld Unless Assailable under Subsection (b). — The decision of the Commission with regard to rates for public utilities will be upheld by the Court of Appeals on appeal unless it is assailable on one of the grounds enumerated in subsection (b) of this section. State ex rel. Utils. Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

Judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria of this section which circumscribe judicial review. State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

A decision of the Utilities Commission will be upheld on appeal unless the appellate court finds error based on one of the enumerated grounds of this section. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Absence of proper findings is an error of law and basis for remand under subdivision (b)(4) of this section because it frustrates appellate review. State ex rel. Utils. Comm'n v. Conservation Council, 66 N.C. App. 456, 311 S.E.2d 617, rev'd in part, 312 N.C. 59, 320 S.E.2d 679 (1984); State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

Scope of Reveiw. — Grounds for relief not specifically set forth in the notice of appeal filed with the Commission may not be relied upon in the appellate courts; however, even when specific grounds are set forth, the applicable scope of review may be determined only from an examination of the issues brought forward by the appealing party and the nature of the supporting contentions. Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

The failure to include all the necessary findings of fact is an error of law and a basis for remand under subdivision (b)(4) of this section, because it frustrates appellate review. State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

The Commission's order must be sufficient within itself to comply with the statute. Failure to include all necessary findings of fact and details is an error of law and a basis for remand under subdivision (b)(4) of this section, because it frustrates appellate review. State ex rel. Utils. Comm'n v. AT & T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

The Commission was required to make specific finds showing what effect, if any, it gave to financing costs or down market protection, or both, in arriving at its common equity rate of return decision. Failure to do so constituted an error of law requiring a remand for further proceedings. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

Function of Court on Review. — The Court of Appeals looks to the findings of fact and conclusions of the Commission and determines whether the Commission has considered the factors required by law and whether its findings are supported by competent, substantial and material evidence in view of the whole record. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

The test upon appeal from a determination of the Utilities Commission is whether the Commission's findings of fact are supported by competent, material and substantial evidence in view of the entire record. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

The Supreme Court's statutory function is not to determine whether there is evidence to support a position the Commission did not adopt. The court asks instead, whether there is substantial evidence, in view of the entire record, to support the position which the Commission adopted. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Appellate court's statutory function is to assess whether the North Carolina Utilities Commission's order is affected by errors of law and to determine whether there is substantial evidence, in view of the entire record, to support the position adopted. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Substantial Evidence Defined. — Substantial evidence is defined as "more than a scintilla or a permissible inference." It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

Commission may agree with single witness, if the evidence supports his position, no matter how many opposing witnesses might come forward. The court is then required to determine whether the Commission's decision is supported by competent, material and substantial evidence in view of the entire record as submitted. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Evidence of Reasonableness of Practice. — Where the Commission's order required the defendants to do no more than they did voluntarily and without objection for 30 years or more, preceding the last six or eight years, this would seem to be "strong evidence" of the reasonableness of the practice. State ex rel. Utils. Comm'n v. Southern Ry., 256 N.C. 359, 124 S.E.2d 510 (1962).

Findings, inferences, conclusions or decision of Utilities Commission which are arbitrary or capricious and which prejudice substantial rights of appellants are not binding on reviewing court. State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

Subsection (c) requires the reviewing court to take due note of the rule of prejudicial error. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

Due account shall be taken of the rule of prejudicial error in the consideration of an appeal. State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

III. LIMITATIONS ON REVIEW.

A. In General.

Limitation on Authority to Review. — The authority of the Court of Appeals and of the Supreme Court in reviewing an order of the Utilities Commission is limited to that conferred by this section. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), aff'd on rehearing, 278 N.C. 235, 179 S.E.2d 419 (1971).

Upon appeal, the authority of the reviewing court to reverse or modify the order of the Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in this section. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel.

Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Courts do not ordinarily review or reverse the exercise of discretionary power by an administrative agency such as the Utilities Commission, except on showing of capricious, unreasonable or arbitrary action or disregard of law. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

On review of orders from the Commission, the Court of Appeals' action is guided by this section, and where the Commission's actions do not violate the Constitution or exceed statutory authority, appellate review is limited to errors of law, arbitrary action, or decisions unsupported by competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

The authority of an appellate court to reverse or modify an order of the Utilities Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in this section, which includes the authority to reverse or modify such order on the ground that it violates a constitutional provision. State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 396, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

Under applicable standards of appellate review, the Court of Appeals is not at liberty to substitute its judgment for that of the Commission. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 57 N.C. App. 489, 291 S.E.2d 789 (1982), modified, 307 N.C. 541, 299 S.E.2d 763 (1983).

Court's Power to Reverse, Modify or Nullify Substantially Circumscribed. — The court's power to affirm or remand is not specifically circumscribed by this section. However, the power of the court to reverse or modify and, a fortiori, to declare null and void, is substantially circumscribed. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

Appellate review of Commission orders is limited to the record as certified. State ex rel. Utils Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Appeals Are Confined to Questions of Law Specifically Set Forth. — Appeals from the Utilities Commission are confined to questions of law upon grounds specifically set forth in appellant's petition for rehearing by the Commission. State ex rel. Utils. Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951). See also State ex rel. Utils. Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

As to necessity for raising grounds for relief before Commission, see State ex rel. Utils. Comm'n v. State, 250 N.C. 410, 109 S.E.2d 368 (1959).

B. Weighing of Evidence.

Weighing of Evidence and Exercise of Judgment Thereon Are Matters for Commission. — The decisions of the Utilities Commission must be within the authority conferred by statute; however, the weighing of the evidence and the exercise of judgment thereon as to transportation problems within the scope of its powers are matters for the Commission. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Commission Without Discretionary Power Where No Evidence to Weigh. — The weighing of the evidence and the exercise of judgment thereon within the scope of its authority are matters for the Commission; even so, the Commission has no discretionary power, where its function is to weigh the evidence and make judgment thereon, if there is no evidence to weigh. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Minimal Consideration of Competent Evidence Correctable on Appeal. — Although it is not for an appellate court to dictate to the Commission what weight it should give to material facts before it, a summary disposition which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. State ex rel. Utils. Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

Comments on Evidence. — The Commission is not required to set forth comments regarding every single fact or item of evidence presented by the parties. Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

Presumption That Commission Considered All Competent Evidence. — In the absence of an express statement by the Commission to the contrary, some record evidence to the contrary, or a summary disposition which indicates to the contrary, the court would presume that the Commission gave proper consideration to all competent evidence presented. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 324 S.E.2d 28 (1986).

The credibility of testimony and the weight to be given it are for the Commission, not for the reviewing court. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

The credibility of testimony was for the determination of the Commission. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

It is a well-established rule that it is for administrative body, in an adjudicatory proceeding, to determine weight and sufficiency of evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

The credibility of testimony and the weight to be accorded it are matters to be determined by the Commission. However, a summary disposition which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

IV. PRIMA FACIE JUST AND REASONABLE.

A. In General.

Commission's Decision Is Prima Facie Just and Reasonable. — This section provides that on an appeal, the Commission's decision is considered "prima facie just and reasonable," and it should be affirmed if supported by substantial evidence. State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

Burden Is on Appellant to Show Error of Law in Proceedings. — The law imposes the duty upon the Utilities Commission and not the courts to fix rates, and the burden is upon appellant from an order of the Commission to show an error of law in the proceeding before the Commission. State ex rel. Utils. Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963).

The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983); State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

The party attacking rates established by the Commission bears the burden of proving their impropriety. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

But Appellant May Show That Order Was Unsupported by Evidence. — Upon appeal the orders made by the Utilities Commission "shall be prima facie just and reasonable," but this does not preclude the appellant from showing that the evidence offered rebuts the prima facie effect of the order, and that the order was unsupported by competent, material and substantial evidence in view of the entire record. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 235 N.C. 273, 69 S.E.2d 502 (1952); State ex rel. Utils. Comm'n v. Gulf-Atlantic Towing Corp., 251 N.C. 105, 110 S.E.2d 886 (1959).

An order of the Commission requiring a transportation company to maintain public service facilities must be considered prima facie reasonable and just, but this does not preclude the transportation company affected from showing that the order was unsupported by competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 238 N.C. 701, 78 S.E.2d 780 (1953); State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

While the determination of a petition by a carrier to be allowed to discontinue an established service rests in large measure in the sound judgment and discretion of the Utilities Commission, and its order in regard thereto is prima facie just and reasonable, such order is reviewable to ascertain whether it is arbitrary or capricious or if the essential findings of fact on which it is based are supported by competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

B. Rates.

Rates Are Deemed Prima Facie Just and Reasonable. — Upon appeal, rates fixed by the Commission shall be deemed prima facie just and reasonable. State ex rel. N.C. Utils. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

Rates fixed by the Commission are deemed prima facie just and reasonable. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Legitimate Justification for Industrial and City Rates of Return. — The North Carolina Utilities Commission drew legitimate distinctions which justified its decision to maintain industrial and cities' rates of return at a higher level than residential and commercial and small industrial rates. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Rates of Return Reasonable and Not Discriminatory. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the approved rates of return were just and reasonable and did not unreasonably discriminate among the various classes of North Carolina Natural Gas Corporation customers and were supported by substantial evidence in view of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

Order prescribing different Private Line Service rates for AT & T's nonreseller (end user) customers and its reseller customers upon its face was discriminatory, and absent legally adequate reasons in the order why the order was not unjustly discriminatory within the meaning of § 62-2(4), the order was vacated and the cause is remanded to the Commission for further proceedings. State ex rel. Utils. Comm'n v. AT & T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

Determining a Utility's Capital Structure for Rate Making Purposes. — The Commission is not required, as a matter of law, to reduce the common equity component of a utility's capital structure by an amount equal to its investment in its nonregulated subsidiaries in determining the appropriate capital structure for rate making purposes. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

C. Findings.

Findings of fact made by the Commission are prima facie just and reasonable on appeal. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Court May Not Find Facts or Regulate Utilities. — Although in reviewing an order of the Commission, a court might, upon the same facts, have reached a different result, it is not for the court to find the facts or to regulate utilities. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

When an appeal to the superior court (now to the Court of Appeals) is taken from an order entered by the North Carolina Utilities Commission, the review is limited to the record as certified and to the questions of law presented therein. There is no provision for additional findings of fact by the judge for the purpose of determining the validity of the order entered by the Commission. State ex rel. Utils. Comm'n v. Fox, 236 N.C. 553, 73 S.E.2d 464 (1952); State v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953). See State ex rel. Utils. Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

Findings supported by competent, material and substantial evidence in view of the entire record are binding upon the reviewing court. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utils. Comm'n v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 47 N.C. App. 418, 267 S.E.2d 488 (1980); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 851 (1980). See also, State ex rel. Utils. Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

All findings of fact made by the Commission, which are supported by competent, material and substantial evidence, are conclusive. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utils. Comm'n v. Public Staff, 52 N.C. App. 275, 278 S.E.2d 599 (1981); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 313 N.C. 215, 328 S.E.2d 264 (1985); State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

When the Commission's findings are supported by competent, material and substantial evidence, they are binding upon the appellate court. State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

The Commission's findings and conclusions, where supported by competent, material, and substantial evidence, considering the whole record, and taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn, must be affirmed. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 57 N.C. App. 489, 291 S.E.2d 789 (1982), modified, 307 N.C. 541, 299 S.E.2d 763 (1983).

The Commission's order will not be disturbed if upon consideration of the entire record the court finds that the decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

Even Though Reviewing Court Might Have Reached Different Conclusion. — Neither findings of fact nor the Commission's determination of what rates are reasonable may be reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

If the rates are reasonable upon an application of the whole record test, the Court of Appeals is bound by the findings of fact establishing them and may not reach a different finding merely because it could have reached another determination upon the evidence. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

When the record, considered as a whole, contains substantial evidence supporting the subjective judgment of the Commission on any of the factors in the fixing of reasonable rates under § 62-133, the conclusion reached by the Commission may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission, nor is the Commission required to accept as conclusive the subjective judgment of a witness, even though the record contains no expression of a contrary opinion by another witness. State ex rel. Utils. Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

The authority to determine the adequacy of a utility's service and the rates to be charged lies with the Commission, and a reviewing court may not modify or reverse its determination merely because the court would have reached a different finding based on the evidence. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 317 N.C. 26, 343 S.E.2d 898 (1986); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 91 N.C. 107, 370 S.E.2d 567 (1988).

Any finding of fact made by the Commission, if supported by competent, material and substantial evidence is conclusive, even if the reviewing court would have reached a different result on the same evidence. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

Finding Held Error of Law. — Finding of the Commission that legal fees which were incurred by utility in contesting the amount of an administrative penalty imposed as a result of its failure to provide adequate water service were recoverable as part of its operating expenses, in that they were "a reasonable and necessary expenditure" which was associated with its water service to its customers, constituted an error of law under subdivision (b)(4) of this section. State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

Where the individualized nature of a shuttle operation precluded performance by a common carrier, the Utilities Commission erred as a matter of law in finding that performance of the shuttle contract constituted common carriage. State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

Formula Did Not Unreasonably Discriminate. — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the Industrial Sales Tracker Formula did not unreasonably discriminate between North Carolina Natural Gas Corporation's customer classes and these findings were supported by substantial evidence in light of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

D. Determinations.

Determination by Commission Is Prima Facie Just and Reasonable. — A determination by the Commission is not simply prima facie evidence of its validity, but is prima facie just and reasonable. State ex rel. Utils. Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953); State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955); State ex rel. N.C. Utils. Comm'n v. Casey, 245 N.C. 297, 96 S.E.2d 8 (1957); State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The Commission, not the reviewing court, is to make determination of fair value of the properties. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

While the Commission has the duty to weigh evidences of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

The Supreme Court may not reverse an order of the Commission because of its weighting of the respective indicators of "fair value," unless it finds such weighting to have been arbitrary and lacking support in the evidence, in view of the entire record, or otherwise affected by error of law. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

The question of whether a case "is to be a general rate case" under the terms of § 62-137 is a mixed question of law and fact. As to such questions, courts should be hesitant to disturb the Commission's expert determination with regard to the nature of the case presented, particularly when its determination is made prior to hearing and for the initial purpose of setting the scope of the hearing and the resulting amount of information which the public utility will be required to furnish. Even at that stage, however, the Commission's determination must be supported by "competent, material and substantial evidence in view of the entire record as submitted." State ex rel. Utils. Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

What constitutes public convenience and necessity is primarily an administrative question with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service, whether the existing carriers can reasonably meet this need, and whether the service would endanger or impair the operations of existing carriers contrary to the public interest. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

E. Orders.

Order of Commission Is Prima Facie Just and Reasonable. — By this section an order of the Commission is prima facie just and reasonable. This applies to orders approving contracts of public utilities. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

When Order Will Be Affirmed. — Where the order of the Utilities Commission granting petitioner an increase in rates in a general rate case is justified by the findings of fact which are supported by plenary evidence, the order of the Commission will be affirmed. State ex rel. Utils. Comm'n v. Tidewater Natural Gas Co., 259 N.C. 558, 131 S.E.2d 303 (1963).

The rate order of the Commission will

be affirmed if upon consideration of the whole record the appellate court finds that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

When Order Remanded to Commission for Further Hearing. — An order of the Commission based on an erroneous interpretation of law should be remanded to the Commission for further hearing and not be terminated by the court where the Commission has the duty to make a positive determination, such as the fixing of rates, and because of some error of law the determination is in suspense, and the utility is entitled to have the determination made. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Inadequate Order. — Order which set forth specific complaints from some customers, but did not state what to do to make the service adequate, and did not indicate in what manner the company violated the Commission's standards, nor what those standards were, was inadequate. State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

V. CASES DECIDED PRIOR TO 1949 REVISION OF PROCEDURAL SECTIONS.

Editor's Note. — *All of the cases below were decided before the 1949 revision of the procedural provisions of this Chapter, and construe former §§ 62-20 and 62-21, corresponding to § 62-90 and this section. It should be noted that the 1949 revision made many changes in procedure, and especially in the extent of review.*

Appeal to Superior Court under Former Law Was Trial de Novo. — Upon appeal under the former statute by a party to a proceeding before the Corporation Commission from an order made therein under former §§ 62-42 and 62-43, the superior court had jurisdiction to try and determine both issues of law and issues of fact, duly presented by assignments of error based upon exceptions duly taken by the appellant during the hearing before the Commission. The trial of such issues by the superior court was de novo. State ex rel. Corp. Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928). See also State ex rel. Corp. Comm'n v. Seaboard Air Line & S. Ry., 161 N.C. 270, 76 S.E. 554 (1912).

A provision of former § 62-21 that on appeal the trial should be "under the same rules and regulations as are prescribed for the trial of other civil causes" meant that the trial should be de novo. State ex rel. Utils. Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943). See also North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Under this Chapter as it stood before the 1949 revision, the trial in the superior court was de novo, and from thence only would a further appeal lie to the Supreme Court, governed by the rule that such an appeal should not be fragmentary, but should be from a final judgment or one final in its nature. State ex rel. Corp. Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

Rules Applicable on Appeal to Superior Court. — Prior to the 1949 revision, on appeal to the superior court the trial was under the same rules and regulations applicable in other civil causes, save and except the prima facie effect to be given the decision or determination of the Commission. State ex rel. Utils. Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943).

Appeals from the Utilities Commissioner were analogous to appeals from a justice of the peace rather than appeals from a referee; hence, since the trial in the superior court was de novo upon issues of fact raised by the exceptions, the superior court properly refused to pass upon appellant's exceptions to the findings of fact seriatim. State ex rel. Utils. Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

Decision of Commission "Prima Facie Just and Reasonable". — While on appeal from the Utilities Commission to the superior court the provision of former § 62-21 was interpreted to mean that the trial should be de novo, the section also provided that the decision or determination of the Commission "shall be prima facie just and reasonable." State ex rel. Utils. Comm'n v. Great S.

Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943).

Findings of Fact Not Conclusive. — Former §§ 62-20 and 62-21 did not contain any provision that the findings of fact by the Utilities Commission should be conclusive on appeal. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

What Evidence Admissible. — On appeal from an order of the Commission under former § 62-21 the trial was de novo, tried under the same rules and regulations as are prescribed for the trial of other civil causes; and any relevant evidence could be there introduced, whether it had theretofore been introduced before the Commission or not. State ex rel. Corp. Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

Admission of Evidence Held Reversible Error. — Where a union passenger depot had been ordered by the Commission, it was reversible error in the superior court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values in a nearby town where the present station of one of the roads was located. State ex rel. Corp. Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

When Appellee Entitled to Affirmance of Decision. — Under former § 62-21, in the absence of a showing that the decision of the Utilities Commission was clearly unreasonable and unjust, appellee, on appeal to the superior court, was entitled to an affirmance of the decision of the Commission. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 224 N.C. 390, 30 S.E.2d 328 (1944).

In an application for a certificate of public convenience and necessity, the Utilities Commission must act within the authority conferred by the statute; however, the findings from the evidence and the exercise of judgment thereon within the scope of its powers are matters for the Commission, and its order will not be disturbed when sustained by the findings upon competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Fredrickson Motor Express, 232 N.C. 180, 59 S.E.2d 582 (1950).

ARTICLE 5A.

Siting of Transmission Lines.

§ 62-100. Definitions.

As used in this Article:

(1) The term "begin to construct" includes any clearing of land, excavation, or other action that would adversely affect the natural environment of the route of a transmission line; but that term does not include land surveys, boring to ascertain geological conditions, or similar preliminary work undertaken to determine the suitability of proposed routes for a transmission line that results in temporary changes to the land;

(2) The word "county" means any one of the counties listed in G.S. 153A-10;

(3) The word "land" means any real estate or any estate or interest in real estate, including water and riparian rights, regardless of the use to which it is devoted;

(4) The word "lines" means distribution lines and transmission lines collectively;

(5) The word "municipality" means any incorporated community, whether designated as a city, town, or village and any area over which it exercises any of the powers granted by Article 19 of Chapter 160A of the General Statutes;

(6) The term "public utility" means a person, whether organized under the laws of this State or under the laws of any

other state or country, engaged in producing, generating, transmitting, delivering, or furnishing electricity for private or public use, including counties, municipalities, joint municipal power agencies, electric membership corporations, and public and private corporations; and

(7) The term "transmission line" means an electric line designed with a capacity of at least 161 kilovolts. (1991, c. 189, s. 1.)

Editor's Note. — Session Laws 1991, c. 189, s. 3, made this Article effective December 1, 1991, but provides that the Article shall not apply to any transmission line that the public utility or other person has begun to construct before that date.

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

§ 62-101. Certificate to construct transmission line.

(a) No public utility or any other person may begin to construct a new transmission line without first obtaining from the Commission a certificate of environmental compatibility and public convenience and necessity.

(b) A transmission line for which a certificate is required shall be constructed, operated, and maintained in conformity with the certificate. A certificate may be amended or transferred with the approval of the Commission.

(c) A certificate is not required for construction of the following lines:

(1) A line designed to carry less than 161 kilovolts;

(2) The replacement or expansion of an existing line with a similar line in substantially the same location, or the rebuilding, upgrading, modifying, modernizing, or reconstructing of an existing line for the purpose of increasing capacity or widening an existing right-of-way;

(3) A transmission line over which the Federal Energy Regulatory Commission has licensing jurisdiction, if the Commission determines that agency has conducted a proceeding substantially equivalent to the proceeding required by this Article;

(4) Any transmission line for which, before March 6, 1989, a public utility or other person has surveyed a proposed route and, based on that route, has acquired rights-of-way for it by voluntary conveyances or has filed condemnation proceedings for acquiring those rights-of-way which, together, involve twenty-five percent (25%) or more of the total length of the proposed route;

(5) An electric membership corporation owned transmission line for which the construction or upgrading has had a proceeding conducted which the Commission determines is substantially equivalent to the proceeding required by this Article;

(6) Any line owned by a municipality to be constructed wholly within the corporate limits of that municipality.

(d) The Commission may waive the notice and hearing requirements of this Article and issue a certificate or amend an existing certificate under either of the following circumstances:

(1) When the Commission finds that the owners of land to be crossed by the proposed transmission line segment do not object to such a waiver and either:
  a. The transmission line will be less than one mile long; or
  b. The transmission line is for the purpose of relocating an existing transmission line segment to resolve a highway or other public project conflict; to accommodate a commercial, industrial, or other private development conflict; or to connect an existing transmission line to a substation, to another public utility, or to a public utility customer when any of these is in proximity to the existing transmission line.

(2) If the urgency of providing electric service requires the immediate construction of the transmission line, provided that the Commission shall give notice to those parties listed in G.S. 62-102(b) before issuing a certificate or approving an amendment.

(e) When justified by the public convenience and necessity and a showing that circumstances require immediate action, the Commission may permit an applicant for a certificate to proceed with initial clearing, excavation, and construction before receiving the certificate required by this section. In so proceeding, however, the applicant acts at its own risk, and by granting such permission, the Commission does not commit to ultimately grant a certificate for the transmission line.

(f) Nothing in this section restricts or impairs the Commission's jurisdiction pursuant to G.S. 62-73 to hear or make complaints. (1991, c. 189, s. 1.)

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

§ 62-102. Application for certificate.

(a) An applicant for the certificate described in G.S. 62-101 shall file an application with the Commission containing the following information:

(1) The reasons the transmission line is needed;

(2) A description of the proposed location of the transmission line;

(3) A description of the proposed transmission line;

(4) An environmental report setting forth:
  a. The environmental impact of the proposed action;
  b. Any proposed mitigating measures that may minimize the environmental impact; and
  c. Alternatives to the proposed action.

(5) A list of all necessary approvals that the applicant must obtain before it may begin to construct the transmission line; and

(6) Any other information the Commission requires.

(b) Within 10 days of filing the application, the applicant shall serve a copy of it on each of the following in the manner provided in G.S. 1A-1, Rule 4:

(1) The Public Staff;
(2) The Attorney General;
(3) The Department of Environment, Health, and Natural Resources;
(4) The Department of Commerce;
(5) The Department of Transportation;
(6) The Department of Agriculture;
(7) The Department of Cultural Resources;
(8) Each county through which the applicant proposes to construct the transmission line;
(9) Each municipality through whose jurisdiction the applicant proposes to construct the transmission line; and
(10) Any other party that the Commission orders the applicant to serve.

The copy of the application served on each shall be accompanied by a notice specifying the date on which the application was filed.

(c) Within 10 days of the filing of the application, the applicant shall give public notice to persons residing in each county and municipality in which the transmission line is to be located by publishing a summary of the application in newspapers of general circulation so as to substantially inform those persons of the filing of the application. This notice shall thereafter be published in those newspapers a minimum of three additional times before the time for parties to intervene has expired. The summary shall also be sent to the North Carolina State Clearinghouse. The summary shall be subject to prior approval of the Commission and shall contain at a minimum the following:

(1) A summary of the proposed action;
(2) A description of the location of the proposed transmission line written in a readable style;
(3) The date on which the application was filed; and
(4) The date by which an interested person must intervene.

(d) Inadvertent failure of service on or notice to any municipality, county, governmental agency, or other person described in this section may be cured by an order of the Commission designed to give that person adequate notice to enable effective participation in the proceeding.

(e) An application for an amendment of a certificate shall be in a form approved by and shall contain any information required by the Commission. Notice of such an application shall be in the same manner as for a certificate. (1991, c. 189, s. 1; 1991 (Reg. Sess., 1992), c. 959, s. 18.)

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective January 1, 1993, substituted "Commerce" for "Economic and Community Development" in subdivision (b)(4).

§ 62-103. Parties.

(a) The following persons shall be parties to a certification proceeding under this Article:

(1) The applicant;
(2) The Public Staff.

(b) The following persons may intervene in a certification proceeding under this Article if a petition to intervene is filed with the Commission within 100 days of the filing of the application and the petition is subsequently granted:

(1) Any State department, municipality, or county entitled to notice under G.S. 62-102(b);
(2) Any person whose land will be crossed by the proposed line;
(3) Any other person who can show a substantial interest in the certification proceeding. (1991, c. 189, s. 1.)

§ 62-104. Hearings.

(a) The Commission shall schedule a hearing upon each application filed under this Article not more than 120 days after the filing and shall conclude the proceeding as expeditiously as possible. The Commission may, however, extend this time period for substantial cause.

(b) If, after proper notice of the application has been given, no significant protests are filed with the Commission, the Commission may cancel the hearing and decide the case on the basis of the filed record.

(c) The Commission shall issue an order on each application filed under this Article within 60 days of the conclusion of the hearing. The Commission may extend this time period for substantial cause. (1991, c. 189, s. 1.)

§ 62-105. Burden of proof; decision.

(a) The burden of proof is on the applicant in all cases under this Article, except that any party proposing an alternative location for the proposed transmission line shall have the burden of proof in sustaining its position. The Commission may consider any factors that it finds are relevant and material to its decision. The Commission shall grant a certificate for the construction, operation, and maintenance of the proposed transmission line if it finds:

(1) That the proposed transmission line is necessary to satisfy the reasonable needs of the public for an adequate and reliable supply of electric energy;
(2) That, when compared with reasonable alternative courses of action, construction of the transmission line in the proposed location is reasonable, preferred, and in the public interest;
(3) That the costs associated with the proposed transmission line are reasonable;
(4) That the impact the proposed transmission line will have on the environment is justified considering the state of available technology, the nature and economics of the various alternatives, and other material considerations; and
(5) That the environmental compatibility, public convenience, and necessity require the transmission line.

(b) If the Commission determines that the location of the proposed transmission line should be modified, it may condition its certificate upon modifications it finds necessary to make the findings and determinations set forth in subsection (a) of this section. (1991, c. 189, s. 1.)

§ 62-106. Effect of local ordinances.

Within 30 days after receipt of notice of an application as provided by G.S. 62-102, a municipality or county shall file with the Commission and serve on the applicant the provisions of an ordinance that may affect the construction, operation, or maintenance of the proposed transmission line in the manner provided by the rules of the Commission. If the municipality or county does not serve notice as provided above of any such ordinance provisions, the provisions of such ordinance may not be enforced by the municipality or county. If the applicant proposes not to comply with any part of the ordinance, the applicant may move the Commission for an order preempting that part of the ordinance. Service of the motion on the municipality or county by the applicant shall make the municipality or county a party to the proceeding. If the Commission finds that the greater public interest requires it, the Commission may include in a certificate issued under this Article an order preempting any part of such county or municipal ordinance with respect to the construction, operation or maintenance of the proposed transmission line. (1991, c. 189, s. 1.)

§ 62-107. Rules.

Pursuant to G.S. 62-31, the Commission may adopt rules to carry out the purposes of this Article. In addition, the Commission shall adopt rules requiring public utilities to file periodic reports stating their short-term and long-term plans for construction of transmission lines in this State. (1991, c. 189, s. 1.)

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

§§ 62-108, 62-109: Reserved for future codification purposes.

ARTICLE 6.

The Utility Franchise.

§ 62-110. Certificate of convenience and necessity.

CASE NOTES

I. In General.

I. IN GENERAL.

Standing to Contest Application for Certificate. — Plaintiff utilities which, by virtue of their contiguity to subdivision were in a superior position to any other utility in the area to provide service to the development since no other competitor would be able to provide for subdivision without first obtaining a certificate, and in the event that another company sought a certificate, plaintiffs would be afforded the opportunity to contest the application, had a legitimate expectation of entitlement sufficient to give them a protectible interest so as to challenge city's provision of water to the subdivision. Quality Water Supply, Inc. v. City of Wilmington, 97 N.C. App. 400, 388 S.E.2d 608, cert. denied, 326 N.C. 597, 393 S.E.2d 881, 882 (1990).

Water company "occupies" through presence of water lines. — Subsection (a) of this section requires only that a company "occupy" an area not being served by another utility. A water company "occupies" through the presence of its water lines in the territory. Quality Water Supply, Inc. v. City of Wilmington, 97 N.C. App. 400, 388 S.E.2d 608, cert. denied, 326 N.C. 597, 393 S.E.2d 881, 882 (1990).

Order for Cellular Carriers to Pay Access Charges Held Proper. — The Utilities Commission did not err by ordering cellular carriers to pay access charges to local exchange companies when providing wide area call reception to their cellular customers. State ex rel. Utilities Comm'n v. Centel Cellular Co., 103 N.C. App. 731, 407 S.E.2d 257 (1991).

Cited in State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992).

§ 62-110.1. Certificate for construction of generating facility; analysis of long-range needs for expansion of facilities.

CASE NOTES

Subsection (c) of this section makes it clear that the only purpose of a least-cost planning proceeding is to assist the Utilities Commission in developing, publicizing, and keeping current an analysis of the long-range needs for expansion of facilities for the generation of electricity in North Carolina. Nowhere is it suggested in subsection (c) that the purpose of the proceeding is to issue directives which fundamentally alter a given utility's operations. State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992).

Scope of Commission's Authority and Jurisdiction. — North Carolina Utilities Commission's dismissal of petitioner independent power producer's application and its establishment of minimum filing requirements did not constitute an impermissible deviation from the process specifically provided in this section and § 62-82, and some deviation from these sections was not beyond the Commission's authority and jurisdiction. State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993), cert. denied, 335 N.C. 564, 441 S.E.2d 125 (1994).

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

§ 62-110.2. Electric service areas outside of municipalities.

(a) As used in this section, unless the context otherwise requires, the term:

(1) "Premises" means the building, structure, or facility to which electricity is being or is to be furnished; provided, that two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for commercial, industrial, institutional, or governmental purposes, shall together constitute one "premises," except that any such building, structure, or facility shall not, together with any other building, structure, or facility, constitute one "premises" if the electric service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure, or facility; and

(2) "Line" means any conductor for the distribution or transmission of electricity, other than

a. In the case of overhead construction, a conductor from the pole nearest the premises of a consumer to such premises, or a conductor from a line tap to such premises, and

b. In the case of underground construction, a conductor from the transformer (or junction point, if there be one) nearest the premises of a consumer to such premises.

(3) "Electric supplier" means any public utility furnishing electric service or any electric membership corporation.

(b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:

(1) Every electric supplier shall have the right to serve all premises being served by it, or to which any of its facilities for service are attached, on April 20, 1965.

(2) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965, which are located wholly within 300 feet of such electric supplier's lines as such lines exist on April 20, 1965, except premises which, on said date, are being served by another electric supplier or to which any of another electric supplier's facilities for service are attached.

(3) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965, which are located wholly within 300 feet of lines that such electric supplier constructs after April 20, 1965, to serve consumers that it has the right to serve, except premises located wholly within a service area assigned to another electric supplier pursuant to subsection (c) hereof.

(4) Any premises initially requiring electric service after April 20, 1965, which are located wholly or partially within 300 feet of the lines of one electric supplier and also wholly or partially within 300 feet of the lines of another electric supplier, as each of such supplier's lines exist on April 20,

1965, or as extended to serve consumers that the supplier has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(5) Any premises initially requiring electric service after April 20, 1965, which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) hereof, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(6) Any premises initially requiring electric service after April 20, 1965, which are located partially within a service area assigned to one electric supplier and partially within a service area assigned to another electric supplier pursuant to subsection (c) hereof, or are located partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and partially within 300 feet of the lines of another electric supplier, as such lines exist on April 20, 1965, or as extended to serve consumers it has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and the electric supplier not so chosen shall not thereafter furnish service to such premises.

(7) Any premises initially requiring electric service after April 20, 1965, which are located only partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and are located wholly outside the service areas assigned to other electric suppliers and are located wholly more than 300 feet from other electric suppliers' lines, may be served by any electric supplier which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(8) Every electric supplier shall have the right to serve all premises located wholly within the service area assigned to it pursuant to subsection (c) hereof.

(9) No electric supplier shall furnish temporary electric service for the construction of premises which it would not have the right to serve under this subsection if such premises were already constructed. The construction of lines for, and the furnishing of, temporary service for the construction of premises which any other electric supplier, if chosen by the consumer, would have the right to serve if such premises were already constructed, shall not impair the right of such other electric supplier to furnish service to such premises after the construction thereof, if then chosen by the consumer; nor, unless the consumer chooses to have such premises served by the supplier which furnished the temporary service, shall the furnishing of such temporary service or the construction of a line therefor impair the right of any other electric supplier to furnish service to any

other premises which, without regard to the construction of such temporary service line, it has the right to serve.

(10) No electric supplier shall furnish electric service to any premises in this State outside the limits of any incorporated city or town except as permitted by this section; provided, that nothing in this section shall restrict the right of an electric supplier to furnish electric service to itself or to exchange or interchange electric energy with, purchase electric energy from or sell electric energy to any other electric supplier.

(c)(1) In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign, as soon as practicable after January 1, 1966, to electric suppliers all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments; provided, that the Commission may leave unassigned any area in which the Commission, in its discretion, determines that the existing lines of two or more electric suppliers are in such close proximity that no substantial avoidance of duplication of facilities would be accomplished by assignment of such area. The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers.

(2) The Commission, upon agreement of the affected electric suppliers, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another; and the Commission, notwithstanding the lack of such agreement, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another, except premises being served by the other electric supplier or to which any of its facilities for service are attached and except such portions of such area as are within 300 feet of the other electric supplier's lines, upon finding that such reassignment is required by public convenience and necessity. In determining whether public convenience and necessity requires such reassignment, the Commission shall consider, among other things, the adequacy and dependability of the service of the affected electric suppliers, but shall not consider rate differentials between such electric suppliers.

(d) Notwithstanding the provisions of subsections (b) and (c) of this section:

(1) Any electric supplier may furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, upon agreement of the affected electric suppliers; and

(2) The Commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and after hear-

ing, if a hearing is requested by any affected electric supplier or any other interested party, to order any electric supplier which may reasonably do so to furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, and to order such other electric supplier to cease and desist from furnishing electric service to such premises, upon finding that service to such consumer by the electric supplier which is then furnishing service, or which has the right to furnish service, to such premises, is or will be inadequate or undependable, or that the rates, conditions of service or service regulations, applied to such consumer, are unreasonably discriminatory.

(e) The furnishing of electric service in any area which becomes a part of any municipality after April 20, 1965, either by annexation or incorporation, (whether or not such area, or any portion thereof, shall have been assigned pursuant to subsection (c) of this section) shall be subject to the provisions of Part 2, Article 16 of Chapter 160A of the General Statutes, and any provisions of this section inconsistent with said Article shall not be applicable within such area after the effective date of such annexation or incorporation. (1965, c. 287, s. 5; 1989 (Reg. Sess., 1990), c. 1024, s. 14.)

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective July 27, 1990, substituted "Part 2, Article 16 of Chapter 160A" for "Article 41 of Subchapter X of Chapter 160" in subsection (e).

CASE NOTES

I. In General.
II. Municipality.

I. IN GENERAL.

Power to Transfer Discretionary. — Under subsection (d)(2), once the Utilities Commission has made appropriate findings which would justify a transfer, the power of the Commission to order a transfer is discretionary. Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

Punitive Acts Unauthorized. — Authority for a punitive basis for the transfer of customers by the Utilities Commission would have to be expressly enacted by our General Assembly. Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

Decision by Utilities Commission to transfer customers to punish an electric supplier exceeded its authority under subdivision (d)(2). Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994).

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

II. MUNICIPALITY.

Only Limit on City as Supplier of Electric Service is "Reasonable Limits" in § 160A-312. — Since a municipality is not an "electric supplier" as that term is used in this section its public works commission is not prohibited from supplying electric service to a customer outside city's limits, so long as its extension of service is within "reasonable limitations," as provided for in § 160A-312. South River Elec. Membership Corp. v. City of Fayetteville, 113 N.C. App. 401, 438 S.E.2d 464 (1994).

§ 62-111. Transfers of franchises; mergers, consolidations and combinations of public utilities.

CASE NOTES

Public Convenience and Necessity for Proposed Transfers of Water and Sewer Franchises. — When the commission is adjudging public convenience and necessity in the context of proposed transfers of water and sewer franchises under subsection (a) of this section, it must inquire into all aspects of anticipated service and rates occasioned and engendered by the proposed transfer, and then determine whether the transfer will serve the public convenience and necessity. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

Question of Whether Purchaser of Water or Sewer Franchise Can Provide Better Service. — The question of whether another potential purchaser of a water or sewer franchise can provide better service is plainly relevant under the broad public convenience and necessity test of subsection (a) of this section. But such a showing would not of itself be dispositive of the issue of whether approval should be granted. When weighing the broad aspects and implications of public convenience and necessity, the Commission is cloaked with wide discretion and is not required to reject an application for transfer merely because another potential purchaser produces evidence that it might be able to do a better job. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

Transfers of Utility Franchises Cannot be Made Contingent Upon Commission Approval. — Lawful transfers of ownership and control of utility franchises cannot be made contingent upon or subject to commission approval; however, in emergency situations, the Commission can issue temporary or interim orders giving conditional or temporary approval of operational control. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

This section does not permit the completion of transfers contingent upon or subject to Commission approval; the legislature, by the unambiguous terms of the statute, clearly intended to prohibit de facto transfers of franchises before the Commission has had the opportunity to pass upon the merits of the transfer under the public convenience and necessity test. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

"Fit, Willing, and Able" Condition of Approval Is Relevant Under Subsection (a). — The "fit, willing, and able" condition of approval set forth in subsection (e) pertaining to transfers of motor carrier franchises is also a relevant question under the separate public convenience and necessity test of subsection (a). State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

Subsection (e) Operates as Separate Test. — The plain language of subsection (e) of this section unambiguously indicates the intent of the legislature for that section to operate as a separate and distinct test, applying only to transfers of motor carrier franchises; that the broader public convenience and necessity test necessarily subsumes under it some of the same elements does not alter this fact. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

Subsection (e) is inapplicable to transfer approval proceedings involving water and sewer franchises. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

§ 62-118. Abandonment and reduction of service.

(a) Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power, after petition and notice, to authorize by order any public utility to abandon or reduce such service. Upon request from any party having an interest in said utility service, the Commission shall hold a public hearing on such petition, and may on its own motion hold a public hearing on such petition. Provided, however, that abandonment or reduction of service of motor carriers shall not be subject to this section, but shall be authorized only under the provisions of G.S. 62-262(k) and G.S. 62-262.2.

(b) If any person or corporation furnishing water or sewer utility service under this Chapter shall abandon such service without the prior consent of the Commission, and the Commission subsequently finds that such abandonment of service causes an emergency to exist, the Commission may, unless the owner or operator of the affected system consents, apply in accordance with G.S. 1A-1, Rule 65, to a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or 7A-48 in the district or set of districts as defined in G.S. 7A-41.1 in which the person or corporation so operates, for an order restricting the lands, facilities and rights-of-way used in furnishing said water or sewer utility service to continued use in furnishing said service during the period of the emergency. An emergency is defined herein as the imminent danger of losing adequate water or sewer utility service or the actual loss thereof. The court shall have jurisdiction to restrict the lands, facilities, and rights-of-way to continued use in furnishing said water or sewer utility service by appropriate order restraining their being placed to other use, or restraining their being prevented from continued use in furnishing said water or sewer utility service, by any person, corporation, or their representatives. The court may, in its discretion, appoint an emergency operator to assure the continued operation of such water or sewer utility service. The court shall have jurisdiction to require that reasonable compensation be paid to the owner, operator or other party entitled thereto for the use of any lands, facilities, and rights-of-way which are so restricted to continued use for furnishing water or sewer utility service during the period of the emergency, and it may require the emergency operator of said lands, facilities, and rights-of-way to post bond in an amount required by the court. In no event shall such compensation, for each month awarded, exceed the net average monthly income of the utility for the 12-month period immediately preceding the order restricting use.

(c) Whenever the Commission, upon complaint or investigation upon its own motion, finds that the facilities being used to furnish water or sewer utility service are inadequate to such an extent that an emergency (as defined in G.S. 62-118(b) above) exists, and further finds that there is no reasonable probability of the owner or operator of such utility obtaining the capital necessary to improve or replace the facilities from sources other than the customers, the Commission shall have the power, after notice and hearing, to authorize by order that such service be abandoned or reduced to those customers who are unwilling or unable to advance their fair share of the capital necessary for such improvements. The amount of capital to be advanced by each customer shall be subject to approval by the Commission, and shall be advanced under such conditions as will enable each customer to retain a proprietary interest in the system to the extent of the capital so advanced. The remedy prescribed in this subsection is in addition to other remedies prescribed by law. (1933, c. 307, s. 32; 1963, c. 1165, s. 1; 1971, c. 552, s. 1; 1973, c. 1393; 1985, c. 676, s. 14; 1987 (Reg. Sess., 1988), c. 1037, s. 93; 1989 (Reg. Sess., 1990), c. 1024, s. 15.)

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective July 27, 1990, substituted "G.S. 62-262(k)" for "G.S. 62-262(h)" in subsection (a).

ARTICLE 6A.

Radio Common Carriers.

§ 62-125. Exemption for cellular telephone service.

Notwithstanding any other provisions of law, the Commission may, to the extent it finds such services to be competitive and such action in the public interest, exempt domestic public cellular radio telecommunications service providers, if licensed by the Federal Communications Commission, from regulation under any or all of the provisions of this Chapter. Nothing in this section shall be construed to diminish any other authority granted the Commission in this Chapter. (1991, c. 82, s. 1.)

Editor's Note. — Session Laws 1991, c. 82, s. 2 made this section effective May 13, 1991.

CASE NOTES

"Competitive Services" Found. — The status of the cellular telephone service market at the time of deregulation hearing was sufficient to constitute competition within the meaning of this section. State ex rel. Utils. Comm'n v. Thornburg, 111 N.C. App. 903, 433 S.E.2d 790 (1993).

§§ 62-126 through 62-129: Reserved for future codification purposes.

ARTICLE 7.

Rates of Public Utilities.

§ 62-130. Commission to make rates for public utilities.

Editor's Note. — Session Laws 1991, c. 240, provides: "Section 1. The State Utilities Commission shall authorize one or more telephone companies, including at least one of the two largest companies operating in the State, to conduct a pilot program within the State in accordance with this act. The program shall be conducted individually by each of the telephone companies participating in the program, and shall be designed to evaluate the cost-effectiveness, public benefit, and feasibility of implementing a limitation on the duration of local telephone calls placed at coin-operated and coinless public telephones. Participating companies shall alter a certain number of coin-operating and coinless public telephones in one of the following manners: a) so that the telephones automatically terminate the connection on a local call after a period of between seven and ten minutes; or b) so that the telephones time local calls in predetermined increments with a local charge applied to each increment. The number of telephones to be altered, the number of minutes after which the cut-off occurs, and the increments of time shall be determined by the participating companies. The number of telephones to be altered shall be determined by identifying the number necessary to reliably evaluate the cost-effectiveness and usefulness of the program. Participating telephone companies shall provide to the Utilities Commission upon request all information necessary to evaluate the program.

"Sec. 2. The length of the pilot program provided for in Section 1 of this act shall be at least six months but no longer than one year and shall be completed no later than December 31, 1992.

"Sec. 3. The State Utilities Commission shall report the results and conclusions from the program to the Joint Legislative Utility Review Committee within three months of the completion of the pilot program, but not later than March 1, 1993."

CASE NOTES

Applied in State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

§ 62-131. Rates must be just and reasonable; service efficient.

CASE NOTES

Applied in State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

§ 62-132. Rates established under this Chapter deemed just and reasonable; remedy for collection of unjust or unreasonable rates.

CASE NOTES

"Established" rates, unlike "permitted" or "allowed" rates, are determined by the Commission after a full hearing, findings, conclusions and a formal order. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

Appropriate Claims for Relief May Exist Under §§ 62-139 and 62-140. — An appropriate claim for relief where the disputed rates are "established" by the Commission may exist under § 62-140 which prohibits unreasonable discrimination by public utilities, or under § 62-139 which prohibits a utility from receiving more compensation for services than the amount prescribed by the Commission. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

Applied in Eaton Corp. v. Public Serv. Co., 99 N.C. App. 174, 392 S.E.2d 404 (1990).

§ 62-133. How rates fixed.

(a) In fixing the rates for any public utility subject to the provisions of this Chapter, other than bus companies, motor carriers and certain water and sewer utilities, the Commission shall fix such rates as shall be fair both to the public utilities and to the consumer.

(b) In fixing such rates, the Commission shall:

(1) Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within the State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress). In ascertaining the cost of the public utility's property, construction work in progress as of the effective date of this subsection shall be excluded until such plant comes into service but reasonable and prudent expenditures for construction work in progress after the effective date of this subsection may be included, to the extent the Commission considers such inclusion in the public interest and necessary to the financial stability of the utility in question, subject to the provisions of subparagraph (b)(4a) of this section.

(1a) Apply the rate of return established under subdivision (4) of this subsection to rights-of-way acquired through agreements with the Department of Transportation pursuant to G.S. 136-19.5(a) if acquisition is consistent with a definite plan to provide service within five years of the date of the agreement and if such right-of-way acquisition will result in benefits to the ratepayers. If a right-of-way is not used within a reasonable time after the expiration of the five-year period, it may be removed from the rate base by the

Commission when rates for the public utility are next established under this section.

(2) Estimate such public utility's revenue under the present and proposed rates.

(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

(4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

(4a) Require each public utility to discontinue capitalization of the composite carrying cost of capital funds used to finance construction (allowance for funds) on the construction work in progress included in its rate based upon the effective date of the first and each subsequent general rate order issued with respect to it after the effective date of this subsection; allowance for funds may be capitalized with respect to expenditures for construction work in progress not included in the utility's property upon which the rates were fixed. In determining net operating income for return, the Commission shall not include any capitalized allowance for funds used during construction on the construction work in progress included in the utility's rate base.

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivisions (1) and (1a) of this subsection.

(c) The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

(d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

(e) The fixing of a rate of return shall not bar the fixing of a different rate of return in a subsequent proceeding.

(f) Repealed by Session Laws 1991, c. 598, s. 7, effective July 8, 1991.

(g) Reserved.

(h) The Commission is not authorized to entertain applications filed on behalf of intrastate rail carriers to fix rates for a single commodity or to fix rates for groups of commodities which constitute less than a general rate increase. (1899, c. 164, s. 2, subsec. 1; Rev., s. 1104; C.S., s. 1068; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1971, c. 1092; 1973, c. 956, s. 1; c. 1041, s. 1; 1975, c. 184, s. 2; 1977, c. 691, ss. 2, 3; 1981, c. 476; 1981 (Reg. Sess., 1982), c. 1197, s. 6; 1985, c. 676, s. 15(2); 1989 (Reg. Sess., 1990), c. 962, s. 4; 1991, c. 598, s. 7.)

Editor's Note. —

Session Laws 1991, c. 598, s. 7, which repealed subsection (f), provides that its repeal shall not affect the right of any natural gas local distribution company to recover any costs previously approved by the Commission.

Section 11 of Session Laws 1991, c. 598 provides that the enactment of ss. 7 and 8 of c. 598 "shall not have any effect on any matter presently before any court."

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective July 18, 1990, in subsection (b) added subdivision (1a), and substituted "subdivisions (1) and (1a) of this subsection" for "subdivision (1)" in subdivision (5).

The 1991 amendment, effective July 8, 1991, repealed subsection (f), exempting certain rate changes of utilities engaged in the distribution of natural gas bought at wholesale from subsections (b), (c) and (d).

CASE NOTES

I. In General.
II. Powers and Duties of Utilities Commission, Generally.
III. Fixing of Rates, Generally.
IV. Rate Base.
  A. In General.
V. Operating Expenses and Working Capital.
VI. Rate of Return.
VII. Test Period.

I. IN GENERAL.

Applied in State ex rel. Utils. Comm'n v. Public Staff, 331 N.C. 215, 415 S.E.2d 354 (1992); State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 106 N.C. App. 491, 417 S.E.2d 75 (1992).

II. POWERS AND DUTIES OF UTILITIES COMMISSION, GENERALLY.

Commission's Rate Making Powers Not Governed by Principles of Res Judicata. — Since the exercise of the Commission's rate making power is a legislative rather than a judicial function, such orders are not governed by the principles of res judicata, and are reviewable in later appeals of closely related matters. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Attorney General's appeal from Utilities Commission order was not barred by the doctrine of res judicata, where the prior Commission rulings relied on by appellee power company as a bar to appellant's position were all designated by the Commission as "general rate cases" in which appellee sought Commission authority to increase its electric rates and charges, and where in fixing the rates to be charged by the utility, the Commission was exercising a function delegated to it by the legislative branch of the government. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Tax Reform Benefits Passed on to

Ratepayers by Rulemaking Rather Than Ratemaking Procedure. — Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 (TRA-86) through a rulemaking procedure rather than a ratemaking procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

When Commission's Orders Affirmed. —

In accord with the main volume. See State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Error to Accept Design Criteria of Division of Environmental Management. — It was error for the Utilities Commission to arbitrarily or subserviently accept, in place of its own determination upon the evidence before it, design criteria of the Division of Environmental Management as the actual plant capacity currently needed for service to existing customers—and the beginning point for determining the appropriate additional "capacity allowance" in the rate base of plant which was not presently in service to the public, but was held for future use. State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

III. FIXING OF RATES, GENERALLY.

The **"reasonable operating expenses,"** specified in subdivisions (b)(3) and (5) of this section, relate and must be directly connected to "the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period," as specified in subsection (b)(1). State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

Burden of Proof. — The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Additions for Used and Useful Plant. — Subsection (c) of this section only requires the Utilities Commission to consider post-test period changes in used and useful plant. It also requires the Commission to consider changes in costs and revenues. If the evidence does not show what changes there may be in matching costs and revenues, the Commission does not have to allow additions to the rate base for a used and useful plant. State ex rel. Utils. Comm'n v. Water Serv., Inc., 328 N.C. 299, 401 S.E.2d 353 (1991).

Fundamental Changes in Sources and Supply. — Where filings reflected decisions by natural gas company's management to make fundamental changes in its sources of supply of natural gas and to access substantial additional volumes of natural gas, the rate changes generated by these decisions were not of the nature of those to be allowed under former subsection (f) of this section but rather had to be considered and passed upon in a general rate case proceeding pursuant to subsections (a)-(e) of this section. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 106 N.C. App. 218, 415 S.E.2d 758 (1992), cert. denied, 332 N.C. 671, 424 S.E.2d 417 (1992).

Evidence Not Sufficient. — Because of the lack of evidence justifying increase and because the Commission did not consider the future revenue potential, the decision of the Commission was not supported by competent, material, and substantial evidence. State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

IV. RATE BASE.

A. In General.

Matching Revenues and Costs Required for use of Post-Test Year Costs in Rate Base. — Where provider of water and sewer services asks that costs for post-test year use of plants be included in its rate base, the Utilities Commission may, under subsection (c) of this section, require the utility to show matching revenues and costs. State ex rel. Utils. Comm'n v. Water Serv., Inc., 328 N.C. 299, 401 S.E.2d 353 (1991).

"Excess" Facilities Not "Used and Useful." — If facilities are found to be excess, as a matter of law, they can not be considered "used and useful" as that term is used in subdivision (b)(1), and cannot be included in the rate base. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989).

Classification as "Extraordinary Property Retirement" Held Error. — The classification of a physical plant that is not "used and useful" (and thus not includable in a rate base) as "extraordinary property retirement" and subject to recovery through amortization, has no legal basis. State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

Where, after finding a sewer connection to be "no longer used and useful" and erroneously concluding thereupon that it should be treated as extraordinary property retirement and amortized over a six-year period, the Utilities Commission directed the "unamortized balance" to be "included in rate base", the Commission simultaneously treated the unused property as rate base and reasonable operating expenses in direct violation of the ratemaking process. State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

V. OPERATING EXPENSES AND WORKING CAPITAL.

Cancellation Costs as Operating Expense. — There was no error in the Commission's authorization for utility to amortize costs associated with abandoned construction of nuclear power plant as operating expenses for rate making purposes; this action was within the commission's power and supported by competent, material, and substantial evidence. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Costs Held to Be Cancellation Costs. — Costs of the additional burden assured by one unit at nuclear power plant in anticipation of reducing the costs of the remaining three units, which were later cancelled, should have been treated as cancellation costs of the abandoned units, to be recovered as operating expenses through amortization. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989).

VI. RATE OF RETURN.

Rate of Return Defined. —

The overall rate of return is a percentage which the Commission concludes the utility should be permitted to earn on its rate base, which is the cost of the utility's property used and useful in providing service to the public. The rate of return percentage is calculated by subtracting from the utility's revenues its cost of service and dividing the difference by the rate base. State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

VII. TEST PERIOD.

The plain language of subsection (c) merely provides that the components of the rate making formula are to be determined based on an historical test period, and do not require a nexus between operating expenses and "property used and useful." The statute reserves this requirement solely to the reasonable original cost of the public utility's property, the ratebase component which is described in subdivision (b)(1). State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

§ 62-133.2. (Repealed effective July 1, 1997) Fuel charge adjustments for electric utilities.

Section Repealed Effective July 1, 1997. — This section is repealed, effective July 1, 1997, by Session Laws 1991, c. 129, s. 2. For this section as in effect until July 1, 1997, see the main volume.

Editor's Note. —

Session Laws 1991, c. 129, s. 1, effective May 27, 1991, repealed Session Laws 1987, c. 677, s. 5, as amended by Session Laws 1989, c. 15, s. 1, which had provided for repeal of this section effective July 1, 1991.

Session Laws 1991, c. 129, s. 3 provides: "On July 1, 1993 and every two years thereafter, the Utilities Commission shall provide a report to the Joint Legislative Utility Review Committee summarizing the procedures conducted pursuant to G.S. 62-133.2 during the preceding two years and recommending whether this section should be continued, repealed, or amended. The Joint Legislative Utility Review Committee shall report to the General Assembly beginning with the 1994 Regular Session and every two years thereafter which report shall contain the information provided by the Utilities Commission and the Committee's recommendation whether G.S. 62-133.2 should be continued, repealed, or amended."

§ 62-133.4. Gas cost adjustment for natural gas local distribution companies.

(a) Rate changes for natural gas local distribution companies occasioned by changes in the cost of natural gas supply and transportation may be determined under this section rather than under G.S. 62-133(b), (c), or (d).

(b) From time to time, as changes in the cost of natural gas require, each natural gas local distribution company may apply to the Commission for permission to change its rates to track changes in the cost of natural gas supply and transportation. The Commission may, without a hearing, issue an order allowing such rate changes to become effective simultaneously with the effective date of the change in the cost of natural gas or at any other time ordered by the Commission. If the Commission has not issued an order under this subsection within 120 days after the application, the utility may place the requested rate adjustment into effect. If the rate adjustment is finally determined to be excessive or is denied, the utility shall make refund of any excess, plus interest as provided in G.S. 62-130(e), to its customers in a manner ordered by the Commission. Any rate adjustment under this subsection is subject to review under subsection (c) of this section.

(c) Each natural gas local distribution company shall submit to the Commission information and data for an historical 12-month test period concerning the utility's actual cost of gas, volumes of purchased gas, sales volumes, negotiated sales volumes, and transportation volumes. This information and data shall be filed on an annual basis in the form and detail and at the time required by the Commission. The Commission, upon notice and hearing, shall compare the utility's prudently incurred costs with costs recovered from all the utility's customers that it served during the test period. If those prudently incurred costs are greater or less than the recovered costs, the Commission shall, subject to G.S. 62-158, require the utility to refund any overrecovery by credit to bill or through a decrement in its rates and shall permit the utility to recover any deficiency through an increment in its rates.

(d) Nothing in this section prohibits the Commission from investigating and changing unreasonable rates as authorized by this Chapter, nor does it prohibit the Commission from disallowing the recovery of any gas costs not prudently incurred by a utility.

(e) As used in this section, the word "cost" or "costs" shall be defined by Commission rule or order and may include all costs related to the purchase and transportation of natural gas to the natural gas local distribution company's system. (1991, c. 598, s. 8.)

Editor's Note. — Session Laws 1991, c. 598, s. 11, made this section effective upon ratification. The act was ratified July 8, 1991.

Section 11 of Session Laws 1991, c. 598 further provides that the enactment of ss. 7 and 8 of c. 598 "shall not have any effect on any matter presently before any court."

§ 62-134. Change of rates; notice; suspension and investigation.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993).

§ 62-136. Investigation of existing rates; changing unreasonable rates; certain refunds to be distributed to customers.

CASE NOTES

Tax Reform Benefits Passed on to Ratepayers by Rulemaking Rather Than Ratemaking Procedure. — Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 (TRA-86) through a rulemaking procedure rather than a ratemaking procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

§ 62-137. Scope of rate case.

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989); State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

§ 62-138. Utilities to file rates, service regulations and service contracts with Commission; publication; certain telephone service prohibited.

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

§ 62-139. Rates varying from schedule prohibited; refunding overcharge; penalty.

CASE NOTES

Claim for Relief Where Disputed Rates "Established" May Exist Under Section. — An appropriate claim for relief where the disputed rates are "established" by the Commission may exist under § 62-140 which prohibits unreasonable discrimination by public utilities, or under this section which prohibits a utility from receiving more compensation for services than the amount prescribed by the Commission. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

Stated in Eaton Corp. v. Public Serv. Co., 99 N.C. App. 174, 392 S.E.2d 404 (1990).

§ 62-140. Discrimination prohibited.

CASE NOTES

I. In General.

I. IN GENERAL.

Claim for Relief Where Disputed Rates "Established" May Exist Under Section. — An appropriate claim for relief where the disputed rates are "established" by the Commission may exist under this section which prohibits unreasonable discrimination by public utilities, or under § 62-139 which prohibits a utility from receiving more compensation for services than the amount prescribed by the Commission. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

Applied in State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

Stated in Eaton Corp. v. Public Serv. Co., 99 N.C. App. 174, 392 S.E.2d 404 (1990).

Cited in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

§ 62-144. (See editor's note for date change) Free transportation.

(a) All common carriers under the supervision of the Commission shall furnish free transportation to the members of the Commission, and, upon written authority of the Commission, such carriers shall also furnish free transportation to such persons as the Commission may designate in its employ or in the employ of the Department of Motor Vehicles for the inspection of equipment and supervision of safe operating conditions and of traffic upon the highways of the State.

(b) Except as provided in subsection (a), no common carrier shall, directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents, commission agents, employees and retired employees, and members of their immediate families: Provided, that common carriers under this Article may exchange free transportation within the limits of this section and may accept as a passenger a totally blind person accompanied by a guide at the usual and ordinary fare charged to one person under such reasonable regulations as may have been established by the carrier and approved by the Commission.

(c) **(Effective October 1, 1994 — See editor's note)** Any person except those permitted by law accepting free transportation shall be guilty of a Class 1 misdemeanor.

(d) Nothing in this section shall prohibit the carriage, storage or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable or educational purposes, or the use of passes for journeys wholly within this State which have been or may be issued for interstate journeys under the authority of the United States Interstate Commerce Commission. (1899, c. 164, s. 22; c. 642; 1901, c. 652; c. 679, s. 2; 1905, c. 312; Rev., s. 1105; Ex. Sess. 1908, c. 144, s. 4; 1911, cc. 49, 148; 1913, c. 100; 1915, c. 215; 1917, cc. 56, 160; C.S., ss. 1069, 1070, 3492; 1933, c. 134, s. 8; 1941, c. 97; 1949, c. 1132, s. 27; 1953, c. 1279; 1963, c. 1165, s. 1; 1993, c. 539, s. 477; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court" in subsection (c).

§ 62-150. (Effective October 1, 1994 — See editor's note) Ticket may be refused intoxicated person; penalty for prohibited entry.

The ticket agent of any common carrier of passengers shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated. The conductor, driver or other person in charge of any conveyance for the use of the traveling public shall at all times have power to prevent any intoxicated person from entering such conveyance. If any intoxicated person, after being forbidden by the conductor, driver or other person having charge of any such conveyance for the use of the traveling public, shall enter such conveyance, he shall be guilty of a Class 1 misdemeanor. (1885, c. 358, ss. 1, 2, 3; Rev., ss. 2625, 2626, 3757; C.S., s. 3504; 1963, c. 1165, s. 1; 1993, c. 539, s. 478; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in the third sentence.

§ 62-157. Dual party relay system.

Editor's Note. — The historical citation in parentheses at the end of this section, as set out in the main volume, should read "(1989, c. 599)."

§ 62-158. Natural gas expansion.

(a) In order to facilitate the construction of facilities in and the extension of natural gas service to unserved areas, the Commission may, after a hearing, order a natural gas local distribution company to create a special natural gas expansion fund to be used by that company to construct natural gas facilities in areas within the company's franchised territory that otherwise would not be feasible for the company to construct. The fund shall be supervised and administered by the Commission. Any applicable taxes shall be paid out of the fund.

(b) Sources of funding for a natural gas local distribution company's expansion fund may, pursuant to the order of the Commission, after hearing, include:

(1) Refunds to a local distribution company from the company's suppliers of natural gas and transportation services pursuant to refund orders or requirements of the Federal Energy Regulatory Commission;

(2) Expansion surcharges by the local distribution company charged to customers purchasing natural gas or transportation services throughout that company's franchised territory; provided, however, in determining the amount of any surcharge the Commission shall take into account the prices of alternative sources of energy and the need to remain competitive with those alternative sources, and the need to maintain just and reasonable rates for natural gas and transportation services for all customers served by the company; provided further that the expansion surcharge shall not be greater than fifteen cents (15¢) per dekatherm; and

(3) Other sources of funding approved by the Commission.

(c) The application of all such funds to expansion projects shall be pursuant to the order of the Commission. The Commission shall ensure that all projects to which expansion funds are applied are consistent with the intent of this section and G.S. 62-2(9). In determining economic feasibility, the Commission shall employ the net present value method of analysis on a project specific basis. Only those projects with a negative net present value shall be determined to be economically infeasible for the company to construct. In no event shall the Commission authorize a distribution from the fund of an amount greater than the negative net present value of any proposed project as determined by the Commission. If at any time a project is determined by the Commission to have become economically feasible, the Commission may require the company to remit to the expansion fund or to customers appropriate portions of the distributions from the fund related to the project, and the Commission may order such funds to be returned with interest in a reasonable amount to be determined by the Commission. Utility plant acquired with expansion funds shall be included in the local distribution company's rate base at zero cost except to the extent such funds have been remitted by the company pursuant to order of the Commission.

(d) The Commission, after hearing, may adopt rules to implement this section, including rules for the establishment of expansion funds, for the use of such funds, for the remittance to the expansion fund or to customers of supplier and transporter refunds and expansion surcharges or other funds that were sources of the expansion fund, and for appropriate accounting, reporting and ratemaking treatment. The Commission and Public Staff shall report to the Joint Legislative Utility Review Committee on the operation of any expansion funds in conjunction with the reports required under G.S. 62-36A. (1991, c. 598, s. 2.)

Editor's Note. — Session Laws 1991, c. 598, s. 11, made this section effective upon ratification. The act was ratified July 8, 1991.

ARTICLE 11.

Railroads.

§ 62-220. Powers of railroad corporations.

Editor's Note. — Session Laws 1993, c. 235, effective June 29, 1993, provides that Caldwell and Catawba Counties and the Cities of Granite Falls, Hudson, Hickory, Lenoir and Sawmills may create the Carolina and Northwestern Railroad Authority by following the procedures set forth therein.

§ 62-221. (See editor's note for date change) Engaging in unauthorized business.

(a) It shall be unlawful for any railroad company incorporated under the laws of this State, or any railroad company incorporated under the laws of any other state and operating one or more railroads in this State, to engage in any business other than the business authorized by its or their charter.

(b) **(Effective October 1, 1994 — See editor's note)** Any railroad company violating the provisions of this section shall be guilty of a Class 3 misdemeanor, and upon conviction shall only be fined in the discretion of the court. (Ex. Sess. 1924, c. 80; 1963, c. 1165, s. 1; 1993, c. 539, s. 479; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, in subsection (b) inserted "Class 3" preceding "misdemeanor" and inserted "only" following "upon conviction shall".

§ 62-224. (See editor's note for date change) Obstructing highways; defective crossings; notice; failure to repair after notice misdemeanor.

(a) Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city or town, or other public road authority having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same.

(b) The notice may be served upon the agent of the offending railroad located nearest to the defective or dangerous crossing about which the notice is given, or it may be served upon the section master whose section includes such crossing. Such notice may be served by delivering a copy to such agent or section master, or by registered or certified mail addressed to either of such persons.

(c) **(Effective October 1, 1994 — See editor's note)** If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within 30 days from and after the service of the notice, it shall be guilty of a Class 1 misdemeanor. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense.

(d) This section shall in nowise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. (R.C., c. 61, s. 30; 1874-5, c. 83; Code, s. 1710; Rev., s. 2569; 1915, c. 250, ss. 1, 2; C.S., ss. 3449, 3450; 1963, c. 1165, s. 1; 1993, c. 539, s. 480; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and shall be punished in the discretion of the court" in subsection (c).

CASE NOTES

This section applies exclusively to established roads and ways. Harris v. Southern Ry., 100 N.C. App. 373, 396 S.E.2d 623 (1990).

This Section Held a Safety Statute. — City ordinance which prescribed that the railroad "do all such ... things as may be necessary for a smooth, easy and comfortable crossing of track by pedestrians and every kind of vehicle" and this section were designed for the protection of the public and are, consequently, safety statutes. Sellers v. CSX Transp., Inc, 102 N.C. App. 563, 402 S.E.2d 872 (1991).

§ 62-226. (Effective October 1, 1994 — See editor's note) Cattle guards and private crossings; failure to erect and maintain misdemeanor.

Every company owning, operating or constructing any railroad passing through and over the enclosed land of any person shall, at its own expense, construct and constantly maintain, in good and safe condition, good and sufficient cattle guards at the points of entrance upon and exit from such enclosed land and shall also make and keep in constant repair crossings to any private road thereupon. Every railroad corporation which shall fail to erect and constantly maintain the cattle guards and crossings provided for by this section shall be liable to an action for damages to any party aggrieved, and shall be guilty of a Class 3 misdemeanor and only fined in the discretion of the court. Any cattle guard approved by the Commission shall be deemed a good and sufficient guard under this section. (1883, c. 394, ss. 1, 2, 3; Code, s. 1975; Rev., ss. 2601, 3753; 1915, c. 127; C.S., s. 3454; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1963, c. 1165, s. 1; 1993, c. 539, s. 481; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 3" preceding "misdemeanor" and inserted "only" following "misdemeanor and".

CASE NOTES

Applicability to Completely Enclosed Land and Actions Involving Cattle Guards or Crossings. — This section applies only to completely enclosed land and contemplates that the statute be utilized only for actions involving cattle guards or crossings. Harris v. Southern Ry., 100 N.C. App. 373, 396 S.E.2d 623 (1990).

§ 62-229. (See editor's note for date change) Shelter at division points required; failure to provide a misdemeanor.

(a) It shall be the duty of every person that may now or hereafter own, control, or operate any line of railroad in this State, to erect and maintain at every division point where cars are regularly taken out of trains for repairs or construction work, or where other railroad equipment is regularly made, repaired, or constructed, a building or shed with a suitable and sufficient roof over the repair and construction track or tracks so as to provide that all men or employees permanently employed in the construction and repair of cars, trucks, or other railroad equipment of whatever description shall be under shelter and protected during snows, rains, sleets, hot sunshine, and other inclement weather: Provided, the Commission shall have the power to direct the points at which sheds shall be erected, and the character of the sheds: Provided further, that such order shall only be made after a hearing of which public notice shall have been given.

(b) **(Effective October 1, 1994 — See editor's note)** Any person failing to comply with the requirements of this section shall be guilty of a Class 3 misdemeanor, and for each offense shall only be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). Each day of such failure shall constitute a separate offense. (1913, cc. 65, 117; C.S., s. 6557; 1933, c. 134; 1941, c. 97; 1963, c. 1165, s. 1; 1993, c. 539, s. 482; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, in subsection (b) inserted "Class 3" preceding "misdemeanor" and inserted "only" following "each offense shall".

ARTICLE 12.

Motor Carriers.

§ 62-262.2. Discontinuance or reduction in service.

(a) When a bus company proposes to discontinue service over any intrastate route or proposes to reduce its level of service to any points on a route to a level which is less than one trip per day (excluding Saturdays and Sundays), it shall petition the Commission for permission to do so. Within 10 days after the filing of a petition, the Commission shall require notice to be given.

(b) Any person or the Public Staff may object, to the Commission, to the granting of permission to any bus company to discontinue or reduce transportation under this section. If neither objects to the granting of permission to discontinue or reduce service under this section, within 30 days after the notice as required by subsection (a) of this section, the Commission may grant the permission based on the record and without hearing.

(c) If, within 30 days after the notice as required by subsection (a) of this section, any person or the Public Staff objects in writing to the Commission to granting of such permission, the Commission shall grant such permission unless the Commission finds as a fact, that the discontinuance or reduction in service is not consistent with the public interest or that continuing the transportation, without the proposed discontinuance or reduction, will not constitute an unreasonable burden on interstate commerce. In making a finding under this subsection, the Commission shall accord great weight to the extent to which the interstate and intrastate revenues from the transportation proposed to be reduced or discontinued are less than the variable costs of providing the transportation, including depreciation for revenue equipment. The Commission may also consider, to the extent applicable, all other factors which are to be considered by the Interstate Commerce Commission in a proceeding commenced under 49 U.S.C. § 10935. For the purposes of this section, the bus company filing a petition for permission to discontinue or reduce service shall have the burden of proving (i) the amount of its interstate and intrastate revenues received for transportation to, from or between, but not through, points on the involved intrastate route; and (ii) the system variable costs of providing the transportation.

(d) The Commission may make its determination with or without a public hearing. The Commission shall take final action upon the petition not later than 120 days after any written objections to the petition are filed.

(e) The provisions of G.S. 62-262(k) shall not be applicable to bus companies. (1985, c. 676, s. 21; 1989 (Reg. Sess., 1990), c. 1024, s. 15.)

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective July 27, 1990, substituted "G.S. 62-262(k)" for "G.S. 62-262(h)" in subsection (e).

§ 62-273. (Effective October 1, 1994 — See editor's note) Embezzlement of C.O.D. shipments.

Property received by any motor carrier to be transported in intrastate commerce and delivered upon collection on such delivery and remittance to the shipper of the sum of money stated in the shipping instructions to be collected and remitted to the shipper, and the money collected upon delivery of such party, is hereby declared to be held in trust by any carrier having possession thereof or the carrier making the delivery or collection, and upon failure of any such carrier to account for the property so received, either to the shipper to whom the collection is payable or the carrier making delivery to any carrier handling the property or making the collection, within 15 days after demand in writing by the shipper, or carrier, or upon failure of the delivering carrier to remit the sum so directed to be collected and remitted to the shipper, within 15 days after collection is made, shall be prima facie evidence that the property so received, or the funds so received, has been wilfully converted by such carrier to its own use, and the carrier so offending shall be guilty of a Class H felony and such carrier may be indicted, tried, and punished in the county in which such shipment was delivered to the carrier or in any other county into or through which such shipment was transported by such carrier. (1947, c. 1008, s. 33; 1963, c. 1165, s. 1; 1993, c. 539, s. 1277; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class H felony" for "felony and upon conviction shall be punished by fine or imprisonment, or both, in the discretion of the court".

ARTICLE 14.

Fees and Charges.

§ 62-300. Particular fees and charges fixed; payment.

(a) The Commission shall receive and collect the following fees and charges in accordance with the classification of utilities as provided in rules and regulations of the Commission, and no others:

(1) Twenty-five dollars ($25.00) with each notice of appeal to the Court of Appeals or the Supreme Court, and with each notice of application for a writ of certiorari.

(2) With each application for a new certificate or new permit for motor and rail carrier rights, the fee shall be two hundred fifty dollars ($250.00) when filed by Class 1 motor and rail carriers, one hundred dollars ($100.00) when filed by Class 2 motor and rail carriers, and twenty-five dollars ($25.00) when filed by Class 3 motor and rail carriers, and twenty-five dollars ($25.00) as filing fee for any amendment thereto so as to extend or enlarge the scope of operations thereunder, and twenty-five dollars ($25.00) for each broker who applies for a brokerage license under the provisions of this Chapter.

(3) With each application for a general increase in rates, fares and charges and for each filing of a tariff which seeks general increases in rates, fares and charges, the fee will be five hundred dollars ($500.00) for Class A utilities and Class 1 motor and rail carriers, two hundred fifty dollars ($250.00) for Class B utilities and Class 2 motor and rail carriers, one hundred dollars ($100.00) for Class C utilities and twenty-five dollars ($25.00) for Class D utilities and Class 3 motor and rail carriers; provided that in the case of an application or tariff for a general increase in rates filed by a tariff agent for more than one carrier, the applicable fee shall be the highest fee prescribed for any motor carrier

included in the application or tariff. This fee shall not apply to applications for adjustments in particular rates, fares, or charges for the purpose of eliminating inequities, preferences or discriminations or to applications to adjust rates and charges based solely on the increased cost of fuel used in the generation or production of electric power.

(4) One hundred dollars ($100.00) with each application for discontinuance of train service, or for a change in or discontinuance of station facilities and with each application by motor carrier of passengers for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate.

(5) With each application for a certificate of public convenience and necessity or for any amendment thereto so as to extend or enlarge the scope of operations thereunder, the fee shall be two hundred fifty dollars ($250.00) for Class A utilities, one hundred dollars ($100.00) for Class B utilities, and twenty-five dollars ($25.00) for Class C and D utilities and twenty-five dollars ($25.00) for any other person seeking a certificate of public convenience and necessity.

(5a) With each application by a bus company for an original certificate of authority or for any amendment thereto or to an existing certificate of public convenience and necessity so as to extend or enlarge the scope of operations thereunder the fee shall be two hundred fifty dollars ($250.00).

(6) With each application for approval of the issuance of securities or for the approval of any sale, lease, hypothecation, lien, or other transfer of any property or operating rights of any carrier or public utility over which the Commission has jurisdiction, the fee shall be two hundred fifty dollars ($250.00) for Class A utilities and Class 1 motor and rail carriers, one hundred dollars ($100.00) for Class B utilities and Class 2 motor and rail carriers, and twenty-five dollars ($25.00) for Class C and D utilities and Class 3 motor and rail carriers; provided, that in the case of sales, leases and transfers between two or more carriers or utilities, the applicable fee shall be the highest fee prescribed for any party to the transaction.

(7) Ten dollars ($10.00) with each application, petition, or complaint not embraced in (2) through (6) of this section, wherein such application, petition, or complaint seeks affirmative relief against a carrier or public utility over which the Commission has jurisdiction. This fee shall not apply to applications for adjustments in particular rates, fares or charges for the purpose of eliminating inequities, preferences or discriminations; nor shall this fee apply to applications, petitions, or complaints made by any county, city or town; nor shall this fee apply to applications or petitions made by individuals seeking service or relief from a public utility.

(8) Repealed by Session Laws 1985, c. 454, s. 18.

(9) One dollar ($1.00) for each page (8 1/2 x 11 inches) of transcript of testimony, but not less than five dollars ($5.00) for any such transcript.

(10) Twenty cents (20¢) for each page of copies of papers, orders, certificates or other records, but not less than one

dollar ($1.00) for any such order or record, plus five dollars ($5.00) for formal certification of any such paper, order or record.

(11), (12) Repealed by Session Laws 1985, c. 454, s. 18.

(13) Two hundred fifty dollars ($250.00) with each application for a certificate of public convenience and necessity to construct a transmission line.

(b) All witness fees, officers' fees serving papers, and cost of serving notice by publication shall be paid by the party at whose instance or for whose benefit such fees and costs are incurred.

(c) No application, petition, complaint, notice of appeal, notice of application for writ of certiorari, or other document or paper, the filing of which requires the payment of a fee under this Article, shall be deemed filed until the fees herein required shall have been paid to the Commission.

(d) The fees and charges as set forth in subdivisions (1), (7), (9) and (10) of subsection (a) of this section shall not apply to the State of North Carolina or to any board, department, commission, institution or other agency of the State; and all applications, petitions or complaints submitted by the State of North Carolina or any board, department, commission, institution or other agency of the State shall be filed without the payment of the fees required by this section. All transcripts, papers, orders, certificates, or other records necessary to perfect an appeal, or to determine whether an appeal is to be taken, shall be furnished without charge to the Attorney General upon his request in cases in which the Attorney General appears in the public interest or as representing any board, department, commission, institution or other agency of the State. (1953, c. 825, s. 1; 1955, c. 64; 1957, c. 1152, s. 15; 1961, c. 472, ss. 2-4; 1963, c. 1165, s. 1; 1967, c. 1039; c. 1190, s. 7; 1969, c. 721, s. 2; 1971, c. 736, s. 2; 1975, c. 447, s. 1; 1977, c. 1003; 1977, 2nd Sess., c. 129, s. 32; 1979, c. 792; 1985, c. 311, ss. 1-4; c. 454, ss. 18, 19; c. 676, s. 24; 1991, c. 189, s. 2.)

Effect of Amendments. — The 1991 amendment, effective December 1, 1991, but not applicable to any transmission line that the public utility or other person has begun to construct before that date, added subdivision (a)(13).

§ 62-301: Repealed by Session Laws 1989, c. 787, s. 2, effective July 1, 1989.

Editor's Note. —

Session Laws 1991, c. 451, s. 1, effective June 28, 1991, amends Session Laws 1989, c. 787, s. 5, as set out in the main volume under this section, so as to delete the provision that repeal of the section would expire June 30, 1991, and the provision for reversion of proceeds and interest to the General Fund. As amended, Session Laws 1989, c. 787, s. 5, provides "This act shall become effective July 1, 1989 and shall apply to public utility North Carolina jurisdictional revenues earned on or after that date."

The section is set out above as repealed.

§ 62-302. Regulatory fee.

Editor's Note. —

Session Laws 1989 (Reg. Sess., 1990), c. 937, s. 1, effective July 17, 1990, and applicable to public utility North Carolina jurisdictional revenues earned on or after July 1, 1990, provides: "For the 1990-91 fiscal year, the percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is twelve hundredths percent (0.12%) of each public utility's North Carolina jurisdictional revenues for each quarter."

Session Laws 1991, c. 451, s. 1 amends Session Laws 1989, c. 787, s. 5, as set out in the main volume under this section, so as to delete the June 30, 1991, expiration provision and the provision for reversion of proceeds and interest to the General Fund. As amended, Session Laws 1989, c. 787, s. 5, provides "This act shall become effective July 1, 1989 and shall apply to public utility North Carolina jurisdictional revenues earned on or after that date."

Session Laws 1991, c. 689, s. 143, provides: "The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is nine hundredths percent (0.09%) of each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 1991."

Session Laws 1991, c. 689, s. 352 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1991-93 biennium, the textual provisions of Titles I, II, and III of this act shall apply only to funds appropriated for and activities occurring during the 1991-93 biennium."

Session Laws 1991 (Reg. Sess., 1992) c. 811, s. 8, provides: "The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is eighty-five thousandths percent (0.085%) of each public utilities North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 1992."

Section 9 of Session Laws 1991 (Reg. Sess., 1992), c. 811 provides: "Sections 1 through 6 and Section 8 become effective July 1, 1992. Section 7 of this act is effective for taxable years beginning on or after January 1, 1992. Sections 1 through 5 of this act shall apply to all fees assessed or paid on or after July 1, 1992."

Session Laws 1993, c. 320, s. 1, provides: "The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is eight and one-half hundredths percent (0.085%) of each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 1993."

Session Laws 1993 (Reg. Sess., 1994) c. 664, in s. 2 provides: "The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is eight and one-half hundredths percent (0.085%) of each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 1994."

ARTICLE 15.

Penalties and Actions.

§ 62-313. (Effective October 1, 1994 — See editor's note) Refusal to permit Commission to inspect records made misdemeanor.

Any public utility, its officers or agents in charge thereof, that fails or refuses upon the written demand of the Commission, or a majority of said Commission, and under the seal of the Commission, to permit the Commission, its authorized representatives or employees to examine and inspect its books, records, accounts and documents, or its plant, property, or facilities, as provided for by law, shall be guilty of a Class 3 misdemeanor. Each day of such failure or refusal shall constitute a separate offense and each such offense shall be punishable only by a fine of not less than five hundred dollars ($500.00) and not more than five thousand dollars ($5,000). (1963, c. 1165, s. 1; 1993, c. 539, s. 483; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, in the first sentence inserted "Class 3" preceding "misdemeanor" and in the second sentence inserted "only" following "shall be punishable".

§ 62-318. (Effective October 1, 1994 — See editor's note) Allowing or accepting rebates a misdemeanor.

If any person shall participate in illegally pooling freights or shall directly or indirectly allow or accept rebates on freights, he shall be guilty of a Class 1 misdemeanor. (1879, c. 237, s. 2; Code, s. 1968; Rev., s. 3762; C.S., s. 3520; 1963, c. 1165, s. 1; 1993, c. 539, s. 484; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and, upon conviction, shall be fined not less than one thousand dollars ($1,000) or imprisoned not less than 12 months".

§ 62-319. (Effective October 1, 1994 — See editor's note) Riding on train unlawfully; venue.

If any person, with the intention of being transported free in violation of law, rides or attempts to ride on top of any car, coach, engine or tender, on any railroad in this State, or on the drawheads between cars, or under cars, on truss rods, or trucks, or in any freight car, or on a platform of any baggage car, express car or mail car on any train, he shall be guilty of a Class 3 misdemeanor. Any person charged with a violation of this section may be tried in any county in this State through which such train may pass carrying such person, or in any county in which such violation may have occurred or may be discovered. (1899, c. 625; 1905, c. 32; Rev., s. 3748; C.S., s. 3508; 1963, c. 1165, s. 1; 1993, c. 539, s. 485; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars ($50.00) or imprisoned not more than 30 days".

§ 62-320. (Effective October 1, 1994 — See editor's note) Failure to place name on produce a misdemeanor.

Any person, selling or offering for sale or consignment any barrel, crate, box, case, package or other receptacle containing any berries, fruit, melons, potatoes, vegetables, truck or other produce of any kind whatsoever, to be shipped to any point within or without this State, without the true name of the grower or packer either written, printed, stamped or otherwise placed thereon in distinct and legible characters, shall be guilty of a Class 3 misdemeanor: Provided, that this section shall not apply to railroads, express companies and other carriers selling or offering for sale, for transportation or storage charges or any other charges accruing to such railroads, express companies or other carriers, any barrel, crate, box, case, package, or other receptacle containing berries, fruit, melons, potatoes, vegetables, truck or other produce. (1915, c. 193; C.S., s. 3531; 1963, c. 1165, s. 1; 1993, c. 539, s. 486; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor and shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days".

§ 62-322. (Effective October 1, 1994 — See editor's note) Unauthorized manufacture or sale of switch-lock keys a misdemeanor.

It shall be unlawful for any person to make, manufacture, sell or give away to any other person any duplicate key to any lock used by any railroad company in this State on its switches or switch tracks, except upon the written order of that officer of such railroad company whose duty it is to distribute and issue switch-lock keys to the employees of such railroad company. Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor.

(1909, c. 795; C.S., s. 3477; 1963, c. 1165, s. 1; 1993, c. 539, s. 487; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court" in the second sentence.

§ 62-323. (Effective October 1, 1994 — See editor's note) Willful injury to property of public utility a misdemeanor.

If any person shall willfully do or cause to be done any act or acts whatever whereby any building, construction or work of any public utility, or any engine, machine or structure or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, he shall be guilty of a Class 1 misdemeanor. (1871-2, c. 138, s. 39; Code, s. 1974; Rev., s. 3756; C.S., s. 3478; 1963, c. 1165, s. 1; 1993, c. 539, s. 488; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor".

§ 62-325. (Effective October 1, 1994 — See editor's note) Unlawful motor carrier operations.

(a) Any person, whether carrier, passenger, shipper, consignee, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this Chapter, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulations as in this Chapter provided for motor carriers, shall be deemed guilty of a Class 3 misdemeanor and upon conviction thereof only be fined not more than five hundred dollars ($500.00) for the first offense and not more than two thousand dollars ($2,000) for any subsequent offense.

(b) Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this Article, or other applicable law, or to make specific and full, true, and correct answer to any question within 30 days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to make true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this Article to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a Class 3 misdemeanor and upon conviction thereof only be subject for each offense to a fine of not more than five thousand dollars ($5,000). As used in this subsection the words "kept" and "keep" shall be construed to mean made, prepared, or compiled, as well as retained. It shall be the duty of the Commission to prescribe and enforce such general rules and regulations as it may deem necessary to compel all motor carriers to keep accurate records of all revenue received by them to the end that any tax levied and assessed by the State of North Carolina upon revenues may be collected. Any agent or employee of a motor carrier who shall willfully and knowingly make a false report or record of fares, charges, or other revenue received by a carrier or collected in its behalf shall be guilty of a Class 1 misdemeanor.

(c) Any person who, at any bus terminal, solicits or otherwise attempts to induce any person to use some form of transportation for compensation other than that lawfully using said terminal premises by contract with the terminal operator or by valid order of the Commission shall be guilty of a Class 3 misdemeanor. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1; 1993, c. 539, s. 489; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, in subsections (a) and (b) inserted "Class 3" preceding "misdemeanor" and inserted "only" following "upon conviction thereof"; in the fourth sentence of subsection (b) substituted "Class 1 misdemeanor" for "misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court"; and in subsection (c) substituted "Class 3 misdemeanor" for "misdemeanor and upon conviction thereof shall be fined not more than fifty dollars ($50.00) or imprisoned not to exceed 30 days, or both, in the discretion of the court".

§ 62-326. (Effective October 1, 1994 — See editor's note) Furnishing false information to the Commission; withholding information from the Commission.

(a) Every person, firm or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall knowingly or willfully file or give false information to the Utilities Commission in any report, reply, response, or other statement or document furnished to the Commission shall be guilty of a Class 1 misdemeanor.

(b) Every person, firm, or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall willfully withhold clearly specified and reasonably obtainable information from the Commission in any report, response, reply or statement filed with the Commission in the performance of the duties of the Commission or who shall fail or refuse to file any report, response, reply or statement required by the Commission in the performance of the duties of the Commission shall be guilty of a Class 1 misdemeanor. (1969, c. 765, s. 1; 1993, c. 539, s. 490; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and shall be fined or imprisoned in the discretion of the court" at the end of subsections (a) and (b).

§ 62-327. (Effective October 1, 1994 — See editor's note) Gifts to members of Commission, Commission employees, or public staff.

It shall be unlawful for any officer, agent, employee, or attorney of any public utility or any public utility holding company, subsidiary, or affiliated company, to knowingly offer or make to any member of the Commission, Commission staff, or public staff, any gift of money, property, or anything of value. It shall be unlawful for any member of the Commission, Commission staff, or public staff to knowingly accept any gift of money, property, or anything of value from any officer, agent, employee, or attorney of any public utility or any public utility holding company, subsidiary, or affiliated company; provided, however, that it shall not be unlawful for members of the Commission, Commission staff, or public staff to attend public breakfasts, lunches, dinners, or banquets sponsored by such entities. Any person violating this section shall be guilty of a Class 3 misdemeanor and may only be fined in the discretion of the court; provided, further, that any member of the Commission staff, or member of the public staff violating this section shall also be subject to dismissal for cause. (1977, c. 468, s. 16; 1993, c. 539, s. 491; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, in the last sentence inserted "Class 3" preceding "misdemeanor", and inserted "only" preceding "be fined".

Chapter 62A.

Public Safety Telephone Service.

Sec.
62A-12. (Effective October 1, 1994 — See editor's note) Misuse of 911 system; penalty.

§ 62A-12. (Effective October 1, 1994 — See editor's note) Misuse of 911 system; penalty.

Any person who intentionally calls the 911 number for other than purposes of obtaining public safety assistance commits a Class 1 misdemeanor. (1989, c. 587, s. 1; 1993, c. 539, s. 492; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceeding "misdemeanor."

Chapter 63.

Aeronautics.

Article 2.

State Regulation.

Sec.

63-18. (Effective October 1, 1994 — See editor's note) Dangerous flying a misdemeanor.

63-23. (Effective October 1, 1994 — See editor's note) Penalties.

Article 3.

Stealing, Tampering with, or Operating Aircraft While Intoxicated.

63-25. (Effective October 1, 1994 — See editor's note) Taking of aircraft made crime of larceny.

63-26. (Effective October 1, 1994 — See editor's note) Tampering with aircraft made crime.

63-26.1. (See editor's note for date change) Trespass upon airport property made a crime.

63-27. (See editor's note for date change) Operation of aircraft while impaired.

63-28. (See editor's note for date change) Infliction of serious bodily injury by operation of an aircraft while impaired.

Article 4.

Model Airport Zoning Act.

Sec.

63-31. Adoption of airport zoning regulations.

63-35. (Effective October 1, 1994 — See editor's note) Enforcement and remedies.

Article 6.

Public Airports and Related Facilities.

63-53. Specific powers of municipalities operating airports.

Article 7.

State and Federal Aid; Authority of Department of Transportation.

63-67. Activities eligible for State aid.

63-68. Limitations on State financial aid.

63-73. Letting of contracts.

Article 9.

Changes in Special Use Airspaces.

63-90. Public purpose declared.

63-91. General Assembly review and approval.

63-92. Effect of General Assembly review.

ARTICLE 1.

Municipal Airports.

§ 63-1. Definitions; singular and plural.

CASE NOTES

Cited in Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280 (1987).

§ 63-4. Joint airports established by cities, towns and counties.

Local Modification. — City of Laurinburg and Town of Maxton: 1993, c. 414, s. 10.

For additional local modifications to this section, see the main pamphlet.

ARTICLE 2.

State Regulation.

§ 63-12. Ownership of space.

CASE NOTES

Purpose of this section was to subject the common-law rights recognized and described therein to the right of flight established in § 63-13, not to prohibit a conveyance of air rights independent of the land beneath. Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987).

§ 63-15. Collision of aircraft.

CASE NOTES

Cited in First Fin. Sav. Bank, Inc. v. American Bankers Ins. Co., 783 F. Supp. 963 (E.D.N.C. 1991).

§ 63-18. (Effective October 1, 1994 — See editor's note) Dangerous flying a misdemeanor.

Any airman or passenger who, while in flight over a thickly inhabited area or over a public gathering within this State, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall except while in landing or taking off, fly at such a low level as to disturb the public peace or the rights of private persons in the enjoyment of their homes, or injure the health, or endanger the persons or property on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a Class 1 misdemeanor. (1929, c. 190, s. 9; 1947, c. 1001, s. 2; 1971, c. 936, s. 3; 1993, c. 539, s. 493; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and punishable by a fine of not more than five hundred dollars ($500.00) or imprisonment for not more than one year, or both".

§ 63-20. Qualifications of operator; federal license.

CASE NOTES

Applicability of Federal Regulation Placing Responsibility on Pilot. — The federal regulation that the pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to the operation of the aircraft is made applicable to all flights in North Carolina by state statute. No in-flight negligence of the pilot can be imputed to the passengers who chartered the plane. Nothing short of physical interference with the pilot's operation of the plane would remove the pilot from actual control. Haley v. United States, 654 F. Supp. 481 (W.D.N.C.), aff'd, 829 F.2d 1120 (4th Cir. 1987).

Cited in Bolick v. Sunbird Airlines, 96 N.C. App. 443, 386 S.E.2d 76 (1989).

§ 63-23. (Effective October 1, 1994 — See editor's note) Penalties.

A person who violates any provision of G.S. 63-20, 63-21 or 63-22 of this Article shall be guilty of a Class 2 misdemeanor; provided, however, that acts or omissions made unlawful by G.S. 63-20, 63-21 or 63-22 of this Article shall not be deemed to include any act or omission which violates the laws or lawful regulations of the United States. (1929, c. 190, s. 14; 1993, c. 539, s. 494; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 2" preceding "misdemeanor" and deleted "and punishable by a fine of not more than one hundred dollars ($100.00) or by imprisonment for not more than 90 days, or both" following "misdemeanor".

ARTICLE 3.

Stealing, Tampering with, or Operating Aircraft While Intoxicated.

§ 63-25. (Effective October 1, 1994 — See editor's note) Taking of aircraft made crime of larceny.

Any person who, under circumstances not constituting larceny shall, without the consent of the owner, take, use or operate or cause to be taken, used or operated, an airplane or other aircraft or its equipment, for his own profit, purpose or pleasure, steals the same, is guilty of a Class H felony. (1929, c. 90, s. 1; 1993, c. 539, s. 1278; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "a Class H felony" for "larceny and is punishable accordingly".

§ 63-26. (Effective October 1, 1994 — See editor's note) Tampering with aircraft made crime.

Any person who shall, without the consent of the owner, go upon or enter, tamper with or in any way damage or injure any airplane or other aircraft, or any personal property under the control of or being used by any public or private airport or aircraft landing facility shall be guilty of a Class 1 misdemeanor, and the showing of willful or malicious intent shall not be necessary to sustain a conviction hereunder. (1929, c. 90, s. 2; 1987, c. 818, s. 3; 1993, c. 539, s. 495; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. —

The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and shall be punished by the imposition of a fine not to exceed five thousand dollars ($5,000) or imprisonment of not more than two years, or both".

§ 63-26.1. (See editor's note for date change) Trespass upon airport property made a crime.

(a) It shall be unlawful for any person to trespass upon airport property. For purposes of this section "airport property" means property that is under the control of or is being used by any public or private airport or aircraft landing facility.

(b) **(Effective October 1, 1994 — See editor's note)** A person commits the offense of trespass upon airport property if, without authorization, he enters or remains on airport property that is so enclosed or posted or secured as to demonstrate clearly an intent to keep out intruders. Violation of this section is a Class 2 misdemeanor. (1987, c. 818, s. 4; 1993, c. 539, s. 496; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1987, c. 818, s. 5 made this section effective October 1, 1987.

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor and upon conviction a person shall be punished by imprisonment for up to six months, a fine of up to two thousand five hundred dollars ($2,500), or both" in the second sentence of subsection (b).

§ 63-27. (See editor's note for date change) Operation of aircraft while impaired.

(a) Offense. — A person commits the offense of operation of an aircraft while impaired if he operates an aircraft, whether on the ground or in the air or on water, within this State:

(1) While under the influence of an impairing substance; or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the operating of an aircraft, an alcohol concentration of 0.04 or more.

The relevant definitions contained in G.S. 20-4.01 shall apply to this section.

(b) Defense precluded. — The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(c) Pleading. — In any prosecution for operating an aircraft while impaired, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant operated the aircraft within this State while subject to an impairing substance.

(d) Chemical Analysis. — Any person who operates an airplane or other aircraft, whether on the ground or in the air or on the water within the territorial limits of this State gives consent to chemical analysis if he is charged with the offense of operating an aircraft while impaired. The charging officer must designate the type of chemical analysis to be administered, and it may be administered when he has reasonable grounds to believe that the person charged has committed the specified crime. The chemical analysis shall be performed pursuant to the procedures established under Chapter 20 of the General Statutes applying to motor vehicle violations with the exception that if the person charged refuses to be tested, the charging officer shall, in writing, notify the local office of the Federal Aviation Administration of the individual's refusal. The results of any chemical tests administered pursuant to this section will be admissible into evidence at trial on the offense charged and a written report of the test results shall be made available to the local office of the Federal Aviation Administration.

(e) **(Effective October 1, 1994 — See editor's note)** Punishment. — A person violating this section shall be guilty of a Class 1 misdemeanor. Provided, however, for a second and all subsequent convictions of this section, a person shall be guilty of a Class I felony. (1929, c. 90, s. 3; 1953, c. 675, s. 8; 1987, c. 818, s. 1; 1993, c. 539, ss. 497, 1279; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

Session Laws 1993, c. 539, s. 497, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and shall be punished by imprisonment of not more than two years or a fine not to exceed one thousand dollars ($1,000) or both" in the first sentence of subsection (e).

Session Laws 1993, c. 539, s. 1279, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class I felony" for "Class J felony" in the second sentence of subsection (e).

§ 63-28. (See editor's note for date change) Infliction of serious bodily injury by operation of an aircraft while impaired.

(a) Offense. — A person commits the offense of infliction of serious bodily injury by operation of an aircraft while impaired if, while in violation of G.S. 63-27, he does serious bodily injury to another.

(b) Defense precluded. — The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(c) Pleading. — In any prosecution for infliction of serious bodily injury by operation of an aircraft while impaired, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant did serious bodily injury to another while operating an aircraft within this State while subject to an impairing substance.

(d) **(Effective October 1, 1994 — See editor's note)** Punishment. — Violation of this section is a Class F felony. (1929, c. 90, s. 4; 1953, c. 675, s. 9; 1987, c. 818, s. 2; 1993, c. 539, s. 1280; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class F felony" for "Class H felony" in subsection (d).

ARTICLE 4.

Model Airport Zoning Act.

§ 63-31. Adoption of airport zoning regulations.

(a) Every political subdivision may adopt, administer, and enforce, under the police power and in the manner and upon the conditions hereinafter prescribed, airport zoning regulations, which regulations shall divide the area surrounding any airport within the jurisdiction of said political subdivision into zones, and, within such zones, specify the land uses permitted, and regulate and restrict the height to which structures and trees may be erected or allowed to grow. In adopting or revising any such zoning regulations, the political subdivision shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the federal government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport.

(b) In the event that a political subdivision has adopted, or hereafter adopts, a general zoning ordinance regulating, among other things, the height of buildings, any airport zoning regulations adopted for the same area or portion thereof under this Article may be incorporated in and made a part of such general zoning regulations, and be administered and enforced in connection therewith, but such general zoning regulations shall not limit the effectiveness or scope of the regulations adopted under this Article.

(c) Any two or more political subdivisions may agree, by ordinance duly adopted, to create a joint board and delegate to said board the powers herein conferred to promulgate, administer and enforce airport zoning regulations to protect the aerial approaches of any airport located within the corporate limits of any one or more of said political subdivisions. Such joint board shall have as members two representatives appointed by the chief executive officer of each political subdivision participating in the creation of said board and a chairman elected by a majority of the members so appointed.

(d) The jurisdiction of each political subdivision is hereby extended to the promulgating, adopting, administering and enforcement of airport zoning regulations to protect the approaches of any airport or landing field which is owned by said political subdivision, although the area affected by the zoning regulations may be located outside the corporate limits of said political subdivision. In case of conflict with any airport zoning or other regulations promulgated by any political subdivision, the regulations adopted pursuant to this section shall prevail.

(e) All airport zoning regulations adopted under this Article shall be reasonable, and none shall require the removal, lowering, or other change or alteration of any structure or tree not conforming to the regulations when adopted or amended, or otherwise interfere with the continuance of any nonconforming use, except as provided in G.S. 63-32, subsection (a).

(f) A political subdivision may not adopt an airport zoning regulation in violation of G.S. 63A-18. (1941, c. 250, s. 3; 1945, cc. 300, 635; 1991, c. 749, s. 3.)

Effect of Amendments. — The 1991 amendment, effective July 16, 1991, added subsection (f).

§ 63-35. (Effective October 1, 1994 — See editor's note) Enforcement and remedies.

Each violation of this Article or of any regulations, order, or ruling promulgated or made pursuant to this Article, shall constitute a Class 3 misdemeanor, and each day a violation continues to exist shall constitute a separate offense. In addition, the political subdivision within which the property is located may institute in any court of competent jurisdiction, an action to prevent, restrain, correct or abate any violation of this Article, or of airport zoning regulations adopted under this Article, or of any order or ruling made in connection with their administration or enforcement, and the court shall adjudge to the plaintiff such relief, by way of injunction (which may be mandatory) or otherwise, as may be proper under all the facts and circumstances of the case, in order fully to effectuate the purposes of this Article and of the regulations adopted and orders and rulings made pursuant thereto. (1941, c. 250, s. 7; 1993, c. 539, s. 498; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor and shall be punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days or by both such fine and imprisonment" in the first sentence.

ARTICLE 6.

Public Airports and Related Facilities.

§ 63-53. Specific powers of municipalities operating airports.

In addition to the general powers in this Article conferred, and without limitation thereof, a municipality which has established or may hereafter establish airports, restricted landing areas or other air navigation facilities, or which has acquired or set apart or may hereafter acquire or set apart real property for such purpose or purposes is hereby authorized:

(1) To vest authority for the construction, enlargement, improvement, maintenance, equipment, operation and regulation thereof in an officer, a board or body of such municipality by ordinance or resolution which shall prescribe the powers and duties of such officer, board or body. The expense of such construction, enlargement, improvement, maintenance, equipment, operation and regulation shall be a responsibility of the municipality.

(2) To adopt and amend all needful rules, regulations and ordinances for the management, government and use of any properties under its control whether within or without the territorial limits of the municipality; to appoint airport guards or police with full police powers; to fix by ordinance, penalties for the violation of said ordinances and enforce said penalties in the same manner in which penalties prescribed by other ordinances of the municipality are enforced. It may also adopt ordinances designed to safeguard the public upon or beyond the limits of private airports or landing strips within such municipality or its police jurisdiction against the perils and hazards of instrumentalities used in aerial navigation. Such ordinances shall be published as provided by general law or the charter of the municipality for the publication of similar ordinances. They must conform to and be consistent with the laws of this State and shall be kept in conformity, as nearly as may be, with the then current federal legislation governing aeronautics and the regulations duly promulgated thereunder and rules and standards issued from time to time pursuant thereto.

(3) To lease such airports or other air navigation facilities, or real property acquired or set apart for airport purposes, to private parties, to any municipal or State government or to the national government, or to any department of either thereof, for operation; to lease to private parties, to any municipal or State government or to the national government, or any department of either thereof, for operation or use consistent with the purpose of this Article, space, area, improvements, or equipment on such airports; to sell any part of such airports, other air navigation facilities or real property to any municipal government, or to the United States or to any department or instrumentality thereof, for aeronautical purposes or purposes incidental thereto, and to confer the privileges of concessions of supplying upon its airports goods, commodities, things, services and facilities; provided that in each case in so doing the public is not deprived of its rightful, equal, and uniform use thereof.

(4) To sell or lease any property, real or personal, acquired for airport purposes and belonging to the municipality, which, in the judgment of its governing body, may not be required for aeronautic purposes in accordance with the laws of this State or the provisions of the charter of the municipality governing the sale or leasing of similar municipally owned property.

(5) To determine the charge or rental for the use of any properties under its control and the charges for any services or accommodations and the terms and conditions under which such properties may be used, provided that in all cases the public is not deprived of its rightful, equal, and uniform use of such property. Charges shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality. The municipality shall have and may enforce liens as provided by law for liens and enforcement thereof, for repairs to or improve-

ment or storage or care of any personal property, to enforce the payment of any such charges.

(6) To engage, on an airport, in commercial and industrial land development projects which relate to, develop, or further airborne commerce and cargo and passenger traffic, and, in connection with any project, to improve real estate on an airport and lease that improved real estate to public or private commercial and industrial enterprises, or contract with others to do so.

(7) To exercise all powers necessarily incidental to the exercise of the general and special powers herein created. (1945, c. 490, s. 6; 1991, c. 501, s. 1.)

Local Modification. — Goldsboro-Wayne Airport Authority: 1987 (Reg. Sess., 1988), c. 1006. s. 5.

For additional local modifications to this section, see the main pamphlet.

Editor's Note. — Session Laws 1991, c. 501, s. 2 provides: "This act provides additional powers and shall not be regarded as limiting powers conferred by other laws."

Session Laws 1991, c. 501, s. 3 is a severability clause.

Effect of Amendments. — The 1991 amendment, effective July 2, 1991, added subdivision (6), and redesignated the former subdivision (6) as the present subdivision (7).

ARTICLE 7.

State and Federal Aid; Authority of Department of Transportation.

§ 63-67. Activities eligible for State aid.

Loans and grants of State funds may be made for the planning, acquisition, construction, or improvement of any airport, seaplane base, or heliport owned or controlled, or which will be owned or controlled by any city, county or public airport authority acting by itself or jointly with any other city or county. An airport, seaplane base, or heliport development project or activity eligible for State aid under this Article shall also be deemed to include projects such as air navigation facilities, aviation easements, and the acquisition of land, lighting, marking, security items, terminal improvements, and the elimination of aviation safety hazards, and the preservation or enhancement of essential air service as defined by the Federal Aviation Act of 1958, as amended. (1967, c. 1006, s. 1; 1973, c. 1443, s. 2; 1977, 2nd Sess., c. 1219, s. 39.1; 1979, c. 148, s. 5; 1987 (Reg. Sess., 1988), c. 1086, s. 164.)

Editor's Note. —

Session Laws 1987 (Reg. Sess., 1988), c. 1086, s. 172 is a severability clause.

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective July 1, 1988, added "and the preservation or enhancement of essential air service as defined by the Federal Aviation Act of 1958, as amended" at the end of the section.

§ 63-68. Limitations on State financial aid.

Grants and loans of funds authorized by this Article shall be subject to the following conditions and limitations:

(1) Loans and grants may be for such projects, activities, or facilities as would in general be eligible for approval by the Federal Aviation Administration or its successor agency or agencies with the exception that the requirement that the airport be publicly owned shall not be applicable. Further, airport terminal and security areas, seaplane bases, and heliports are also eligible for State financial aid.

(2) Loans and grants of State funds shall be limited to a maximum of fifty percent (50%) of the nonfederal share of the total cost of any project for which aid is requested, and shall be made only for the purpose of supplementing such other funds, public or private, as may be available from federal or local sources provided, however, using one hundred percent (100%) State funding in its discretion the Department of Transportation may purchase, install and maintain navigational aids necessary for the safe, efficient use of airspace and may conduct other projects or programs to improve the safety and planning of the air transportation system, including but not limited to, marking serviceable runways and taxiways. Further, the Department of Transportation may contract out the maintenance and installation of state-owned navigational aids when necessary and may give or transfer such aids to the Federal Aviation Administration.

(3) Loans and grants of State funds shall be made from General Assembly appropriations specifically designated for aviation improvement, and from no other source. The Department of Transportation may utilize the State Aviation Grant Funds to cover the direct and indirect costs of administering airport grant projects, other services authorized by this Article including planning, and the costs of services provided by nonadministrative Department of Transportation divisions or other State agencies in connection with these projects.

(4) Notwithstanding the provisions of this section or G.S. 63-67, the Department of Transportation may allow up to ten percent (10%) of State aviation grant funds to be used for maintenance on General Aviation and Air Carrier Airports having a Department of Transportation approved maintenance plan on a seventy-five percent (75%) local — twenty-five percent (25%) State basis.

(5) Notwithstanding the provisions of this section, the Department of Transportation may allow loans and grants of State funds up to eighty percent (80%) of the nonfederal share of the total cost of the development of new or unpaved publicly owned airports identified in the North Carolina Airport System Plan, provided that such funding shall be limited to land acquisition, site preparation, basic runway, taxiway, and apron system construction, together with associated lighting and navigational aids, and construction of the primary airport access road. Electronic navigational aids, terminal buildings, access taxiways,

and other items eligible for State airport aid at the rate of fifty percent (50%) of the nonfederal share of project cost shall not be eligible for the foregoing eighty percent (80%) State funding, even though constructed as part of the initial airport development.

(6) Notwithstanding the provisions of this section, the Department of Transportation may allow loans and grants of State funds up to ninety percent (90%) of the total cost of the development of new or unpaved publicly owned rural airports identified in the North Carolina Airport System Plan and receiving no federal funding. Such State funding shall be limited to land acquisition, site preparation, basic runway, taxiway, and apron system construction, together with associated lighting and navigational aids, and construction of the primary airport access road.

The Department of Transportation shall develop rules and regulations to define rural airports. (1967, c. 1006, s. 1; 1969, c. 293; 1973, c. 1262, s. 28; c. 1443, s. 3; 1975, c. 716, s. 3; 1977, 2nd Sess., c. 1219, s. 39.2; 1979, c. 148, ss. 3, 5; c. 149; 1981, c. 1117, ss. 1, 2; 1983, c. 319; 1983 (Reg. Sess., 1984), c. 1094; 1985, c. 782; 1989, c. 636; 1991, c. 430, s. 1.)

Effect of Amendments. —

The 1989 amendment, effective July 13, 1989, added subdivision (6).

The 1991 amendment, effective June 27, 1991, in subdivision (2), near the middle of the subdivision inserted "and planning" and substituted "marking" for "making"; and in subdivision (3), inserted "other services authorized by this Article including planning."

§ 63-73. Letting of contracts.

All contracts that the Department of Transportation may let for construction, repair, maintenance or those services listed in 49 U.S.C. App. § 2210(a)(16) in furtherance of this Article shall be let in accordance with the provisions of G.S. 136-28.1. (1983 (Reg. Sess., 1984), c. 1033, s. 1; 1991, c. 430, s. 2.)

Effect of Amendments. — The 1991 amendment, effective June 27, 1991, at the end of the catchline deleted "for airport construction and repair"; substituted "construction, repair" for "construction or repair or"; and substituted "or those services listed in 49 U.S.C. App. § 2210(a)(16) in furtherance" for "necessary to carry out the provisions."

ARTICLE 9.

Changes in Special Use Airspaces.

§ 63-90. Public purpose declared.

It is the intent of the General Assembly that the legislative branch review and comment on all applications and actions of the Federal Aviation Administration concerning the creation of or changes in special use airspaces for aircraft operation over North Carolina. (1987, c. 494, s. 1.)

Editor's Note. — Session Laws 1987, c. 494, s. 2 made this Article effective upon ratification and applicable to pending changes in ceilings. The act was ratified June 29, 1987.

§ 63-91. General Assembly review and approval.

The Division of Aviation of the Department of Transportation shall bring before the General Assembly or the Joint Legislative Commission on Governmental Operations all applications to the Federal Aviation Administration and all proposed rule changes by the Federal Aviation Administration for the creation of or changes in special use airspaces, including military operation areas and restricted areas for aircraft operation over North Carolina during the period for public comment. If the General Assembly is in session during that period, information on the pending application or rule change shall be presented to the standing Transportation Committees of the House of Representatives and the Senate. If the comment period occurs when the General Assembly is not in session then the Division of Aviation of the Department of Transportation shall bring the relevant information before the Joint Legislative Commission on Governmental Operations. The General Assembly or the Joint Legislative Commission on Governmental Operations will then review and comment on those applications. (1987, c. 494, s. 1.)

§ 63-92. Effect of General Assembly review.

(a) If the General Assembly or the Joint Legislative Commission on Governmental Operations determines that the proposed change is in the best interests of the citizens of this State, then the Division of Aviation of the Department of Transportation shall notify the Federal Aviation Administration of the General Assembly's official position on the pending application or rule change when it submits the State's official position on the pending application or rule change.

(b) If the General Assembly or the Joint Legislative Commission on Governmental Operations determines that the proposed change is not in the best interests of the citizens of this State, then the Division of Aviation of the Department of Transportation shall notify the Federal Aviation Administration of the General Assembly's official position opposing the pending application or rule change when it submits the State's official position on the pending application or rule change. (1987, c. 494, s. 1.)

Chapter 63A.

Editor's Note. — The legislation and annotations affecting Chapter 63A have been included in a recently published replacement chapter.

Chapter 65.

Editor's Note. — The legislation and annotations affecting Chapter 65 have been included in a recently published replacement chapter.

Chapter 66.

Commerce and Business.

Article 1.

Regulation and Inspection.

Sec.
66-4. (Effective October 1, 1994 — See editor's note) Falsely acting as inspector.
66-10. (Effective October 1, 1994 — See editor's note) Failure of dealers of scrap, salvage, or surplus to keep record of purchases of certain items misdemeanor.
66-11. (See editor's note for date change) Dealing in regulated metals property; violations of section Class 1 misdemeanor.
66-11.1. (Effective October 1, 1994 — See editor's note) Transportation of copper.

Article 2.

Manufacture and Sale of Matches.

66-16. (Effective October 1, 1994 — See editor's note) Violation of Article a misdemeanor.

Article 3.

Candy and Similar Products.

66-22. (Effective October 1, 1994 — See editor's note) Violations made misdemeanor.

Article 4.

Electrical Materials, Devices, Appliances and Equipment.

66-27. (Effective October 1, 1994 — See editor's note) Violation made misdemeanor.

Article 4A.

Safety Features of Hot Water Heaters.

66-27.3. (Effective October 1, 1994 — See editor's note) Violation of Article made misdemeanor.

Article 4B.

Safety Features of Trailers.

66-27.5. (See editor's note for date change) House trailers to have two doors.

Article 7.

Tagging Secondhand Watches.

Sec.
66-34. (Effective October 1, 1994 — See editor's note) Violation of Article made misdemeanor.

Article 11.

Government in Business.

66-58. (See editor's note for date change) Sale of merchandise by governmental units.

Article 12.

Coupons for Products of Photography.

66-64. (Effective October 1, 1994 — See editor's note) Violation a misdemeanor.

Article 13.

Miscellaneous Provisions.

66-66. (Effective October 1, 1994 — See editor's note) Manufacture or sale of antifreeze solutions compounded with inorganic salts or petroleum distillates prohibited.
66-67.2. (See editor's note for date change) Persons who sell used goods on consignment must keep certain records.
66-67.3. Disposal of dies, molds, forms, and patterns.

Article 14.

Business under Assumed Name Regulated.

66-71. (See editor's note for date change) Violation of Article a misdemeanor; civil penalty.

Article 16.

Unfair Trade Practices in Diamond Industry.

66-75. (Effective October 1, 1994 — See editor's note) Penalty for violation; each practice a separate offense.

Article 17.
Closing-Out Sales.

Sec.
66-81. (Effective October 1, 1994 — See editor's note) Advertising or conducting sale contrary to Article; penalty.

Article 18.
Labeling of Household Cleaners.

66-86. (Effective October 1, 1994 — See editor's note) Penalty for selling product in violation of Article.

Article 19.
Business Opportunity Sales.

66-97. (See editor's note for date change) Filing with Secretary of State.

Article 20.
Loan Brokers.

66-106. Definitions.
66-108. (See editor's note for date change) Bond or trust account required.
66-109. (See editor's note for date change) Filing with Secretary of State.

Article 22.
Discount Buying Clubs.

Sec.
66-135. (See editor's note for date change) Bond and trust account required.

Article 23.
Rental Referral Agencies.

66-145. (See editor's note for date change) Bond or trust account required.

Article 25.
Regulation of Precious Metal Businesses.

66-167. (Effective October 1, 1994 — See editor's note) Perjury; punishment.
66-169. (Effective October 1, 1994 — See editor's note) Records to be kept.
66-172. (Effective October 1, 1994 — See editor's note) Penalties.
66-173. (Effective October 1, 1994 — See editor's note) Portable smelters prohibited.

Article 30.
Credit Repair Services Act.

66-225. (See editor's note for date change) Violations.

ARTICLE 1.

Regulation and Inspection.

§ 66-4. (Effective October 1, 1994 — See editor's note) Falsely acting as inspector.

If any person, who is not a legal or sworn inspector of lumber or other articles, presume to act as such, he shall forfeit and pay one hundred dollars ($100.00), and be guilty of a Class 1 misdemeanor. (1824, c. 1254, s. 3; R.C., c. 60, s. 69; Code, s. 3046; Rev., s. 3580; C.S., s. 5072; 1993, c. 539, s. 503; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor".

§ 66-10. (Effective October 1, 1994 — See editor's note) Failure of dealers of scrap, salvage, or surplus to keep record of purchases of certain items misdemeanor.

(a) Every person, firm, or corporation buying rubber or leather, rubber belts, and belting, as scrap, salvage, or surplus shall keep a register containing a true and accurate record of each purchase, including the description of the article purchased, the name from whom purchased, the amount paid for the article purchased, the date of the purchase, and any and all marks or brands upon the rubber or leather, rubber belts, and belting. This register and the rubber, leather, rubber belts, and belting purchased shall be at all times open to the inspection of the public. A failure to comply with these requirements or the making of a false entry concerning the rubber or leather, rubber belts, or belting shall constitute a Class 1 misdemeanor.

(b) Every person, firm, or corporation engaged in the business of buying or dealing in scrap, salvage, or surplus, including glass, waste paper, burlap, cloth, cordage, rubber, leather, or belting of every kind, in addition to the above requirements under subsection (a) of this section, shall make and keep a record of the name and address of the person from whom this scrap, salvage, or surplus is purchased and the license number, if any, and if there is no license, a description of the vehicle in which this scrap, salvage, or surplus is delivered. Any person, firm, or corporation which fails to comply with the requirements of this subsection shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined not in excess of fifty dollars ($50.00) in the discretion of the court. (1917, c. 46; C.S., s. 5090; 1957, c. 791; 1993, c. 295, s. 1; 1993, c. 539, s. 504; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 1993, c. 295, s. 1, effective December 1, 1993, and applicable only to offenses committed on or after that date, rewrote this section.

Session Laws 1993, c. 539, s. 504, effective October 1, 1994, and applicable to offenses occurring on or after that date, at the end of the first paragraph inserted "Class 1" preceding "misdemeanor"; and at the end of the second paragraph inserted "Class 3" preceding "misdemeanor" and inserted "only" following "and upon conviction shall".

§ 66-11. (See editor's note for date change) Dealing in regulated metals property; violations of section Class 1 misdemeanor.

(a) Definitions. — As used in this section:

(1) "Law enforcement officer" means any duly constituted law enforcement officer of the State or of any municipality or county.

(2) "Regulated metals property" means all ferrous and nonferrous metals.

(3) "Secondary metals recycler" means any person, firm, or corporation in the State:

a. That, from a fixed location or otherwise, is predominately engaged in the business of gathering or obtaining ferrous or nonferrous metals that have served their original economic purpose or is in the business of performing the manufacturing process by which ferrous metals or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value; or

b. That has facilities for performing the manufacturing process by which ferrous metals or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value, by methods including, but not limited to, the processing, sorting, cutting, classifying, cleaning, baling, wrapping, shredding, shearing, or changing the physical form or chemical content of the metals, but not including the exclusive use of hand tools.

(4) "Fixed location" means any site occupied by a secondary metals recycler as the owner of the site or as a lessee of the site under a lease or other rental agreement providing for occupation of the site by the secondary metals recycler for a total duration of not less than 364 days.

(b) Records Required. —

(1) A secondary metals recycler shall maintain a record of all purchase transactions in which the secondary metals recycler purchases regulated metals property.

(2) The following information shall be maintained for transactions in which a secondary metals recycler purchases regulated metals property:

a. The name and address of the secondary metals recycler.

b. The name, initials, or other identification of the individual entering the information.

c. The date of the transaction.

d. The weight of the regulated metals property purchased.

e. The description made in accordance with the custom of the trade of the type of regulated metals property purchased.

f. The amount of consideration given for the regulated metals property.

g. The name and address of the vendor of the regulated metals property.

h. The drivers license number or identification card number issued by the Division of Motor Vehicles of the person delivering the regulated metals property to the secondary metals recycler, or, if the person delivering the regulated metals property does not have a drivers license or an identification card issued by the Division of Motor Vehicles, a signed written statement that the delivery person does not have a drivers license or an identification card issued by the Division of Motor Vehicles.

(3) A secondary metals recycler shall keep and maintain the information required under this subsection for not less than two years from the date of the purchase of the regulated metals property.

(c) Inspection of Regulated Metals Property and Records. — During the usual and customary business hours of a secondary metals recycler, a law enforcement officer shall have the right to inspect either of the following:

(1) Any and all purchased regulated metals property in the possession of the secondary metals recycler.

(2) Any and all records required to be maintained under subsection (b) of this section.

(d) Cash Transactions. — No secondary metals recycler shall purchase regulated metals property for cash consideration from other than a fixed location.

(e) Right to Restitution. — The court may order a defendant to make restitution to the secondary metals recycler for any damage or loss caused by the defendant arising out of an offense committed by the defendant.

(f) Violations. — Any person violating any of the provisions of this section shall be guilty of a Class 1 misdemeanor.

(g) Exemptions. — This section shall not apply to purchases of regulated metals property from a manufacturing, industrial, or other commercial vendor that generates or sells regulated metals property in the ordinary course of its business.

(h) Preemption. — A county or municipality shall not enact any local law, ordinance, or regulation regulating secondary metals recyclers or regulated metals property that conflicts with this section, and this law preempts all existing laws, ordinances, or regulations. (1907, c. 464; 1909, c. 855, s. 1; C.S., s. 5091; 1967, c. 792; 1971, c. 1231, s. 1; 1975, c. 182, s. 2; 1993, c. 295, s. 2; c. 539, s. 505; 1994, Ex. Sess., c. 14, s. 40; c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 40(a), effective October 1, 1994, repealed Session Laws 1993, c. 539, s. 505, which would have amended this section as it read prior to amendment by Session Laws 1993, c. 295, s. 2, effective October 1, 1994, by substituting "Class 1 misdemeanor" for "misdemeanor."

Effect of Amendments. — Session Laws 1993, c. 295, s. 2, effective December 1, 1993, and applicable only to offenses committed on or after that date, rewrote this section.

The 1994 Extra Session amendment by c. 14, s. 40(b) and (c), effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class 1" in the catchline of this section; and substituted "Class 1 misdemeanor" for "misdemeanor and upon conviction shall be fined not more than five hundred dollars ($500.00), imprisoned for not longer than two years, or both" in subsection (f).

§ 66-11.1. (Effective October 1, 1994 — See editor's note) Transportation of copper.

It shall be unlawful for any person to transport or have in his possession on highways of this State, in any vehicle other than a vehicle used in the ordinary course of business for the purpose of transporting such copper, an amount of such copper of an aggregate weight of more than 25 pounds, unless such person shall have in his possession

(1) A bill of sale pertaining to such copper signed by (i) a holder of a sales and use tax registration number from the North Carolina Department of Revenue; or (ii) an authorized wholesaler engaged in the sale of such copper; or (iii) a registered dealer in scrap metals; or (iv) a seller of antiques or objects of art; or

(2) In the event the person from whom such copper was purchased was other than one of the above enumerated persons or firms, a certificate of origin signed by the sheriff, or his designated representative, of the county in which the purchase was made.

Such bill of sale or certificate of origin shall clearly identify the material to which it applies and show thereon the name and address of the seller, license plate of the vehicle in which such material is delivered to the purchaser, identified by license number, year and state of issue, the name and address of the purchaser, the date of sale, and the type and amount of such copper purchased.

Any person violating the provisions of this section shall be deemed guilty of a Class 2 misdemeanor. (1975, c. 182, s. 1; 1993, c. 539, s. 506; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, in the second paragraph substituted "section" for "subsection" and substituted "Class 2 misdemeanor" for "misdemeanor and upon conviction shall be fined not more than five hundred dollars ($500.00) or be imprisoned for not more than six months".

ARTICLE 2.

Manufacture and Sale of Matches.

§ 66-16. (Effective October 1, 1994 — See editor's note) Violation of Article a misdemeanor.

Any person, association, or corporation violating any of the provisions of this Article shall be guilty of a Class 3 misdemeanor and shall only be fined for the first offense not less than five dollars ($5.00) nor more than twenty-five dollars ($25.00), and for each subsequent violation not less than twenty-five dollars ($25.00).

(1915, c. 109, s. 12, IV; C.S., s. 5117; 1993, c. 539, s. 507; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "guilty of a Class 3 misdemeanor and shall only be" following "Article shall be".

ARTICLE 3.

Candy and Similar Products.

§ 66-22. (Effective October 1, 1994 — See editor's note) Violations made misdemeanor.

Any person convicted for the violation of this Article shall be guilty of a Class 3 misdemeanor. (1939, c. 323, s. 6; 1993, c. 539, s. 508; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor and subject to a fine of not exceeding one hundred dollars ($100.00) or imprisonment for not exceeding 30 days or both fine and imprisonment in the discretion of the court."

ARTICLE 4.

Electrical Materials, Devices, Appliances and Equipment.

§ 66-27. (Effective October 1, 1994 — See editor's note) Violation made misdemeanor.

Any person, firm or corporation who shall violate any of the provisions of this Article shall be guilty of a Class 2 misdemeanor. (1933, c. 555, s. 5; 1989, c. 681, s. 1; 1993, c. 539, s. 509; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500.00), imprisonment for not more than 90 days, or both, for each violation."

ARTICLE 4A.

Safety Features of Hot Water Heaters.

§ 66-27.3. (Effective October 1, 1994 — See editor's note) Violation of Article made misdemeanor.

Violation of any provision of this Article is hereby made a Class 1 misdemeanor. (1965, c. 860, s. 3; 1993, c. 539, s. 510; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor punishable by a fine or imprisonment, or both, in the discretion of the court."

ARTICLE 4B.

Safety Features of Trailers.

§ 66-27.5. (See editor's note for date change) House trailers to have two doors.

(a) In order to provide greater protection from the dangers of fire, every new house trailer having a body length exceeding 32 feet and manufactured or assembled after January 1, 1970, and sold in this State shall, if such house trailer is to be used as a residence or dwelling within this State, be equipped with at least two doors. These doors shall be located in the vicinity of the front and rear rooms of the house trailer. Provided, however, this section shall not apply: to any (i) travel trailer which is factory equipped for the road and designed to be used as a dwelling for travel, recreational or vacation use, if such travel trailer does not exceed 32 feet in length; (ii) to any house trailer of any length sold in North Carolina for use in a state other than North Carolina.

(b) **(Effective October 1, 1994 — See editor's note)** It shall be unlawful for any dealer to sell in this State any house trailer manufactured or assembled after January 1, 1970, having a body length exceeding 32 feet which does not conform to the specifications set forth in subsection (a). Any dealer who violates this section shall be guilty of a Class 3 misdemeanor. (1969, c. 463; 1993, c. 539, s. 511; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor and upon conviction fined not exceeding five hundred dollars ($500.00) or imprisoned not exceeding 30 days" in the second sentence of subsection (b).

ARTICLE 7.

Tagging Secondhand Watches.

§ 66-34. (Effective October 1, 1994 — See editor's note) Violation of Article made misdemeanor.

Any person violating any of the provisions of this Article shall be guilty of a Class 3 misdemeanor. (1941, c. 244, s. 5; 1993, c. 539, s. 512; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars ($50.00), or by imprisonment for not more than 30 days, or both."

ARTICLE 11.

Government in Business.

§ 66-58. (See editor's note for date change) Sale of merchandise by governmental units.

(a) Except as may be provided in this section, it shall be unlawful for any unit, department or agency of the State government, or any division or subdivision of any such unit, department or agency, or any individual employee or employees of any such unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to engage in the operation of restaurants, cafeterias or other eating places in any building owned by or leased in the name of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises, or to contract with any person, firm or corporation for the operation or rendering of any such businesses or services on behalf of any such unit, department or agency, or to purchase for or sell to any person, firm or corporation any article of merchandise in competition with private enterprise. The leasing or subleasing of space in any building owned, leased or operated by any unit, department or agency or division or subdivision thereof of the State for the purpose of operating or rendering of any of the businesses or services herein referred to is hereby prohibited.

(b) The provisions of subsection (a) of this section shall not apply to:

(1) Counties and municipalities.
(2) The Department of Human Resources, the Department of Environment, Health, and Natural Resources, or the Department of Agriculture for the sale of serums, vaccines, and other like products.
(3) The Department of Administration, except that said agency shall not exceed the authority granted in the act creating the agency.
(4) The State hospitals for the insane.
(5) The Department of Human Resources.
(6) The North Carolina School for the Blind at Raleigh.
(7) The North Carolina Schools for the Deaf.
(8) The Greater University of North Carolina with regard to its utilities and other services now operated by it nor to the sale of articles produced incident to the operation of instructional departments, articles incident to educational research, articles of merchandise incident to classroom work, meals, books, or to articles of merchandise not exceeding twenty-five cents (25¢) in value when sold to members of the educational staff or staff auxiliary to education or to duly enrolled students or occasionally to immediate members of the families of members of the educational staff or of duly enrolled students nor to the sale of meals or merchandise to persons attending meetings or conventions as invited guests nor to the operation by the University of North Carolina of an inn or hotel and dining and other facilities usually connected with a hotel or inn, nor to the hospital and Medical School of the University of North Carolina, nor to the Coliseum of North Carolina State College, and the other schools and colleges for higher education maintained or supported by the State, nor to the comprehensive student health services or the comprehensive student infirmaries maintained by the constituent institutions of the University of North Carolina.
(9) The Department of Environment, Health, and Natural Resources, except that said Department shall not construct, maintain, operate or lease a hotel or tourist inn in any park over which it has jurisdiction. The North Carolina Wildlife Resources Commission may sell wildlife memorabilia as a service to members of the public interested in wildlife conservation.
(10) Child-caring institutions or orphanages receiving State aid.
(11) Highlands School in Macon County.
(12) The North Carolina State Fair.
(13) Rural electric memberships corporations.

(13a) State Farm Operations Commission.

(13b) The Department of Agriculture with regard to its lessees at farmers' markets operated by the Department.

(13c) The Western North Carolina Agricultural Center.

(14) Nothing herein contained shall be construed to prohibit the engagement in any of the activities described in subsection (a) hereof by a firm, corporation or person who or which is a lessee of space only of the State of North Carolina or any of its departments or agencies; provided such leases shall be awarded by the Department of Administration to the highest bidder, as provided by law in the case of State contracts and which lease shall be for a term of not less than one year and not more than five years.

(15) The State Department of Correction is authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags for the State and local governments and for such other purposes as the Department may direct.

The Commissioner of Motor Vehicles, or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Department of Correction for the State automobile license tag requirements from year to year.

The price to be paid to the State Department of Correction for such tags shall be fixed and agreed upon by the Governor, the State Department of Correction, and the Motor Vehicle Commissioner, or such authority as may be authorized to purchase such supplies.

(16) Laundry services performed by the Department of Correction may be provided only for agencies and instrumentalities of the State which are supported by State funds and for county or municipally controlled and supported hospitals presently being served by the Department of Correction, or for which services have been contracted or applied for in writing, as of May 22, 1973. In addition to the prior sentence, laundry services performed by the Department of Correction may be provided for the Governor Morehead School and the North Carolina School for the Deaf.

Such services shall be limited to wet-washing, drying and ironing of flatwear or flat goods such as towels, sheets and bedding, linens and those uniforms prescribed for wear by such institutions and further limited to only flat goods or apparel owned, distributed or controlled entirely by such institutions and shall not include processing by any dry-cleaning methods; provided, however, those garments and items presently being serviced by wet-washing, drying and ironing may in the future, at the election of the Department of Correction, be processed by a dry-cleaning method.

(17) The North Carolina Global TransPark Authority or a lessee of the Authority.

(18) The activities and products of private enterprise carried on or manufactured within a State prison facility pursuant to G.S. 148-70.

(c) The provisions of subsection (a) shall not prohibit:

(1) The sale of products of experiment stations or test farms.

(2) The sale of learned journals, works of art, books or publications of the Department of Cultural Resources or other agencies, or the Supreme Court Reports or Session Laws of the General Assembly.

(3) The business operation of endowment funds established for the purpose of producing income for educational purposes; for purposes of this section, the phrase "operation of endowment funds" shall include the operation by public post-secondary educational institutions of campus stores, the profits from which are used exclusively for awarding scholarships to defray the expenses of students attending the institution; provided, that the operation of such stores must be approved by the board of trustees of the institution, and the merchandise sold shall be limited to educational materials and supplies, gift items and miscellaneous personal-use articles. Provided further that sales at campus stores are limited to employees of the institution and members of their immediate families, to duly enrolled students of the campus at which a campus store is located and their immediate families, to duly enrolled students of other campuses of the University of North Carolina other than the campus at which the campus store is located, to other campus stores and to other persons who are on campus other than for the purpose of purchasing merchandise from campus stores. It is the intent of this subdivision that campus stores be established and operated for the purpose of assuring the availability of merchandise described in this Article for sale to persons enumerated herein and not for the purpose of competing with stores operated in the communities surrounding the campuses of the University of North Carolina.

(4) The operation of lunch counters by the Department of Human Resources as blind enterprises of the type operated on January 1, 1951, in State buildings in the City of Raleigh.

(5) The operation of a snack bar and cafeteria in the State Legislative Building.

(6) The maintenance by the prison system authorities of eating and sleeping facilities at units of the State prison system for prisoners and for members of the prison staff while on duty, or the maintenance by the highway system authorities of eating and sleeping facilities for working crews on highway construction or maintenance when actually engaged in such work on parts of the highway system.

(7) The operation by penal, correctional or facilities operated by the Department of Human Resources or by the State Department of Agriculture, of dining rooms for the inmates or clients or members of the staff while on duty and for the accommodation of persons visiting such inmates or clients, and other bona fide visitors.

(8) The sale by the Department of Agriculture of livestock, poultry and publications in keeping with its present livestock and farm program.

(9) The operation by the public schools of school cafeterias.

(10) Sale by any State correctional or other institution of farm, dairy, livestock or poultry products raised or produced by it in its normal operations as authorized by the act creating it.

(11) The sale of textbooks, library books, forms, bulletins, and instructional supplies by the State Board of Education, State Department of Public Instruction, and local school authorities.

(12) The sale of North Carolina flags by or through the auspices of the Department of Administration, to the citizens of North Carolina.

(13) The operation by the Department of Correction of forestry management programs on State-owned lands, including the sale on the open market of timber cut as a part of such management program.

(14) The operation by the Department of Correction of facilities to manufacture and produce traffic and street name signs for use on the public streets and highways of the State.

(15) The operation by the Department of Correction of facilities to manufacture and produce paint for use on the public streets and highways of the State.

(d) A department, agency or educational unit named in subsection (b) shall not perform any of the prohibited acts for or on behalf of any other department, agency or educational unit.

(e) **(Effective October 1, 1994 — See editor's note)** Any person, whether employee of the State of North Carolina or not, who shall violate, or participate in the violation of this section, shall be guilty of a Class 1 misdemeanor.

(f) Notwithstanding the provisions of G.S. 66-58(a), the operation by the Department of Correction of facilities for the manufacture of any product or the providing of any service pursuant to G.S. 148-70 not regulated by the provisions of subsection (c) hereof, shall be subject to the prior approval of the Governor, with biennial review by the General Assembly, at the beginning of each fiscal year commencing after October 1, 1975. The Department of Correction shall file with the Director of the Budget quarterly reports detailing prison enterprise operations in such a format as shall be required by the Director of the Budget.

(g) The North Carolina School of Science and Mathematics may engage in any of the activities permitted by G.S. 66-58(b)(8) and (c)(3). (1929, c. 221, s. 1; 1933, c. 172, s. 18; 1939, c. 122; 1941, c. 36; 1951, c. 1090, s. 1; 1957, c. 349, ss. 6, 10; 1967, c. 996, s. 13; 1973, c. 476, ss. 48, 128, 143; c. 671, s. 1; c. 965; c. 1262, s. 86; c. 1294; c. 1457, s. 7; 1975, c. 730, ss. 2-5; c. 840; c. 879, s. 46; 1977, cc. 355, 715; c. 771, s. 4; 1979, c. 830, s. 4; 1981, c. 635, s. 3; 1983, c. 8; c. 476; c. 717, s. 13; c. 761, s. 168; 1985, c. 589, s. 28; c. 757, s. 206(d); 1989, c. 727, s. 218(9); 1989 (Reg. Sess., 1990), c. 1004, s. 1; 1991, c. 749, s. 7; 1991 (Reg. Sess., 1992), c. 902, s. 3; 1993, c. 539, s. 513; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 769, s. 17.15; c. 777, s. 4(e).)

Editor's Note. —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. —

The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (e).

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 17.15, effective July 1, 1994, inserted "of the campus at which a campus store is located" and "to duly enrolled students of other campuses of the University of North Carolina other than the campus at which the campus store is located" in the second sentence of subdivision (c)(3).

Session Laws 1993 (Reg. Sess., 1994), c. 777, s. 4(e), effective July 17, 1994, substituted "Global TransPark" for "Air Cargo Airport" in subdivision (b)(17).

ARTICLE 12.

Coupons for Products of Photography.

§ 66-64. (Effective October 1, 1994 — See editor's note) Violation a misdemeanor.

Any person violating the provisions of this Article, including the making of any false statement in the affidavit required under G.S. 66-62, shall be guilty of a Class 1 misdemeanor. (1943, c. 25, s. 6; 1991 (Reg. Sess., 1992), c. 1030, s. 17; 1993, c. 539, s. 514; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. —

The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and, upon conviction, be fined or imprisoned, or both, in the discretion of the court".

ARTICLE 13.

Miscellaneous Provisions.

§ 66-66. (Effective October 1, 1994 — See editor's note) Manufacture or sale of antifreeze solutions compounded with inorganic salts or petroleum distillates prohibited.

The manufacture or sale of antifreeze solutions which are designated, intended, advertised, or recommended by the manufacturer or seller for use in the cooling systems of motor vehicles or gasoline combustion engines, and which are compounded with calcium chloride, magnesium chloride, sodium chloride, or other inorganic salts or with petroleum distillates is hereby prohibited.

Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1943, c. 625, ss. 1, 2; 1993, c. 539, s. 515; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and shall be punished in the discretion of the court" in the second paragraph.

§ 66-67.2. (See editor's note for date change) Persons who sell used goods on consignment must keep certain records.

(a) A person who is engaged in the business of selling used tangible personal property on consignment must keep a record of each piece of property consigned to that person for sale. The record must contain all of the following information:

(1) A description of the property, including any model or serial number of the property.
(2) The name, residence address, telephone number, and drivers license number or other identifying number of the owner of the property.
(3) The date the property was consigned.
(4) The owner's stated value of the property.

(b) The consignee shall provide the owner with a copy of the record required by subsection (a) of this section.

(c) **(Effective October 1, 1994 — See editor's note)** A person who fails to keep the records required by this section is guilty of a Class 2 misdemeanor. A law enforcement agency may examine the records required to be kept under this section during business hours.

(d) This section does not apply to a motor vehicle.

(e) This section does not apply to any nonprofit organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)). (1991, c. 536, s. 1; 1993, c. 539, s. 516; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor punishable by imprisonment for up to six months, a fine of up to five hundred dollars ($500.00), or both" in the first sentence of subsection (c).

§ 66-67.3. Disposal of dies, molds, forms, and patterns.

(a) Definitions. — The following definitions apply in this section:

(1) Customer. — Either of the following:

a. A person who causes or caused a molder to fabricate, cast, or otherwise make a die, mold, form, or pattern.

b. A person who causes or caused a molder to use a die, mold, form, or pattern to manufacture, assemble, or otherwise make a product.

(2) Molder. — A tool or die maker or any other person who does either of the following:

a. Fabricates, casts, or otherwise makes a die, mold, form, or pattern.

b. Uses a die, mold, form, or pattern to manufacture, assemble, or otherwise make a product.

(b) Ownership and Transfer. — A customer has all rights, title, and interest to a die, mold, form, or pattern made or used by a molder on behalf of the customer unless an agreement provides otherwise. If the customer does not claim possession of the die, mold, form, or pattern from the molder within three years after the last time it is used, the molder may choose to obtain all rights, title, and interest to the die, mold, form, or pattern by operation of law unless a written agreement provides otherwise.

(c) Procedure. — If a molder chooses to have all rights, title, and interest to a die, mold, form, or pattern transferred to the molder by operation of law, the molder must send a written notice, by registered mail, return receipt requested, to the customer and to any known secured creditor. The notice must state that the molder intends to terminate the customer's rights, title, and interest in a mold, die, form, or pattern by having those rights, title, and interest transferred to the molder by operation of law pursuant to this section. The notice to the customer must be sent to the customer's last known address or, if the customer has designated in writing a different address for receipt of the notice, to the designated address. If a return receipt cannot be obtained for a notice that is mailed, the molder may give notice by publication in accordance with G.S. 1A-1, Rule 4(j1). The rights, title, and interest in a die, mold, form, or pattern are transferred by operation of law to a molder who gives notice as required by this section unless, within 30 days after the date the molder receives acknowledgement of the return receipt of a notice that is mailed or 45 days after the date of first publication of a notice made by publication, the customer takes possession of the die, mold, form, or pattern, or makes other contractual arrangements with the molder for taking possession of or for storing the die, mold, form, or pattern.

(d) Use Upon Transfer. — A molder to whom the rights, title, and interest in a die, mold, form, or pattern is transferred by operation of law under this section may destroy or otherwise dispose of the die, mold, form, or pattern as the molder's own property without any risk of liability to the customer. The molder may not use the die, mold, form, or pattern for any other purpose.

(e) Scope. — This section does not affect a right of a customer under federal patent or copyright law or any state or federal law pertaining to unfair competition. (1993, c. 541, s. 9.)

Editor's Note. — Session Laws 1993, c. 541, s. 10 made this section effective upon ratification. The act was ratified July 24, 1993.

Session Laws 1993, c. 541, s. 10 provides that s. 9, which added this section, applies to dies, molds, forms, or patterns made or used before, on, or after the effective date of the act (July 24, 1993).

ARTICLE 14.

Business under Assumed Name Regulated.

§ 66-71. (See editor's note for date change) Violation of Article a misdemeanor; civil penalty.

(a) Any person, partner or corporation failing to file the certificate as required by G.S. 66-68(a) or G.S. 66-68(c) —

(1) **(Effective October 1, 1994 — See editor's note)** Shall be guilty of a Class 3 misdemeanor, and

(2) Shall be liable in the amount of fifty dollars ($50.00) to any person demanding that such certificate be filed if he fails to file the certificate within seven days after such demand. Such penalty may be collected in a civil action therefor.

(b) The failure of any person to comply with the provisions of this Article does not prevent a recovery by such person in any civil action brought in any of the courts of this State. (1913, c. 77, s. 4; 1919, c. 2; C.S., s. 3291; 1951, c. 381, ss. 6, 7; 1987, c. 723, s. 4; 1993, c. 539, s. 517; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days" in subdivision (a)(1).

ARTICLE 16.

Unfair Trade Practices in Diamond Industry.

§ 66-75. (Effective October 1, 1994 — See editor's note) Penalty for violation; each practice a separate offense.

Any person, firm, corporation or organization engaging in any unfair trade practice, as defined in this Article, shall be guilty of a Class 1 misdemeanor; and each and every unfair trade practice engaged in shall be deemed a separate offense. (1957, c. 585, s. 3; 1993, c. 539, s. 518; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) or imprisoned; or both fined and imprisoned in the discretion of the court".

ARTICLE 17.

Closing-Out Sales.

§ 66-81. (Effective October 1, 1994 — See editor's note) Advertising or conducting sale contrary to Article; penalty.

Any person who shall advertise, hold, conduct or carry on any sale of goods, wares or merchandise under the description of closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise or a distress sale, contrary to the provisions of this Article, or who shall violate any of the provisions of this Article shall be deemed guilty of a Class 1 misdemeanor. (1957, c. 1058, s. 6; 1981, c. 633, s. 7; 1993, c. 539, s. 519; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and shall, upon conviction thereof, be fined or imprisoned, or both, in the discretion of the court".

ARTICLE 18.

Labeling of Household Cleaners.

§ 66-86. (Effective October 1, 1994 — See editor's note) Penalty for selling product in violation of Article.

Any person, firm or corporation selling or offering to sell any product in violation of the terms of this Article shall be guilty of a Class 1 misdemeanor. (1957, c. 1241, s. 2; 1993, c. 539, s. 520; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court".

ARTICLE 19.

Business Opportunity Sales.

§ 66-97. (See editor's note for date change) Filing with Secretary of State.

(a) The seller of every business opportunity shall file with the Secretary of State two copies of the disclosure statement required by G.S. 66-95, accompanied by a fee in the amount of ten dollars ($10.00) made payable to the Secretary of State, prior to placing any advertisement or making any other representations to prospective purchasers in this State. The seller shall update this filing as any material change in the required information occurs, but no less than annually.

(b) Every seller shall file, in such form as the Secretary of State may prescribe, an irrevocable consent appointing the Secretary of State or his successors in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against the seller or his successor, executor or administrator which arises under this Article after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. Service may be made by leaving a copy of the process in the office of the Secretary of State, but is not effective unless (i) the plaintiff, who may be the Attorney General in a suit, action or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his address on file with the Secretary of State, and (ii) the plaintiff's affidavit of compliance with this section is filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

(c) If the seller of a business opportunity is required by G.S. 66-96 to provide a bond or establish a trust account, he shall file with the Secretary of State two copies of the bond or two copies of the formal notification by the depository that the trust account is established contemporaneously with compliance with subsections (a) or (d).

(d) The Secretary of State may accept the Uniform Franchise Offering Circular (UFOC) or the Federal Trade Commission Basic Disclosure Document, provided, that the alternative disclosure document shall be accompanied by a separate sheet setting forth the caption and statement and any other information required by G.S. 66-95.

(e) **(Effective October 1, 1994 — See editor's note)** Failure to so file shall be a Class 1 misdemeanor. (1977, c. 884, s. 1; 1981, c. 817, s. 3; 1993, c. 539, s. 521; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (e).

ARTICLE 20.

Loan Brokers.

§ 66-106. Definitions.

For purposes of this Article the following definitions apply:

(1) A "loan broker" is any person, firm, or corporation who, in return for any consideration from any person, promises to (i) procure for such person, or assist such person in procuring, a loan from any third party; or (ii) consider whether or not it will make a loan to such person.

(2) A "loan" is an agreement to advance money or property in return for the promise to make payments therefor, whether such agreement is styled as a loan, credit card, line of credit, a lease or otherwise.

Provided, that this Article shall not apply to any party approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a National Mortgage Association or any federal agency; nor to any party currently designated and compensated by a North Carolina licensed insurance company as its agent to service loans it makes in this State; nor to any insurance company registered with and licensed by the North Carolina Insurance Commissioner; nor, with respect to residential mortgage loans, to any residential mortgage banker or mortgage broker registered with the Commissioner of Banks pursuant to Article 19 of Chapter 53 or exempt from such registration pursuant to G.S. 53-234(6); nor to any attorney-at-law, public accountant, or dealer registered under the North Carolina Securities Act, acting in the professional capacity for which such attorney-at-law, public accountant, or dealer is registered or licensed under the laws of the State of North Carolina. Provided further that subdivision (1)(ii) above shall not apply to any lender whose loans or advances to any person, firm or corporation in North Carolina aggregate more than one million dollars ($1,000,000) in the preceding calendar year. (1979, c. 705, s. 1; 1981, c. 785, s. 1; 1993, c. 339, s. 2.)

Effect of Amendments. — The 1993 amendment, effective July 14, 1993, in subdivision (2), inserted "credit card, line of credit"; and in the proviso following subdivision (2), inserted "nor, with respect to residential mortgage loans, to any residential mortgage banker or mortgage broker registered with the Commissioner of Banks pursuant to Article 19 of Chapter 53 or exempt from such registration pursuant to G.S. 53-234(6)".

§ 66-108. (See editor's note for date change) Bond or trust account required.

(a) Every loan broker must obtain a surety bond issued by a surety company authorized to do business in this State, or establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. The amount of the bond or trust account shall be ten thousand dollars ($10,000). The bond or trust account shall be in favor of the State of North Carolina. Any person damaged by the loan broker's breach of contract or of any obligation arising therefrom, or by any violation of this Article, may bring an action against the bond or trust account to recover damages suffered. The aggregate liability of the surety or trustee shall be only for actual damages and in no event shall exceed the amount of the bond or trust account.

(b) **(Effective October 1, 1994 — See editor's note)** Failure to comply with subsection (a) shall be a Class 1 misdemeanor.

(c) No loan broker shall collect any advance fee or other valuable consideration from a borrower prior to the closing of the loan. This prohibition shall not preclude the loan broker from collecting reasonable and necessary fees payable to third parties for appraisal, property survey, title examination, and credit reports. (1979, c. 705, s. 1; 1993, c. 339, s. 3; c. 539, s. 522; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 1993, c. 339, s. 3, effective July 14, 1993, added subsection (c).

Session Laws 1993, c. 539, s. 522, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (b).

§ 66-109. (See editor's note for date change) Filing with Secretary of State.

(a) Prior to placing any advertisement or making any other representations to prospective borrowers in this State, every loan broker shall file with the Secretary of State two copies of the disclosure statement required by G.S. 66-107, and either a copy of the bond required by G.S. 66-108, or a copy of the formal notification by the depository that the trust account required by G.S. 66-108 is established. These filings shall be updated as any material changes in the required information or the status of the bond or trust account occur, but no less than annually.

(b) **(Effective October 1, 1994 — See editor's note)** Failure to comply with subsection (a) shall be a Class 1 misdemeanor. (1979, c. 705, s. 1; 1981, c. 785, s. 2; 1993, c. 539, s. 523; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (b).

ARTICLE 22.

Discount Buying Clubs.

§ 66-135. (See editor's note for date change) Bond and trust account required.

(a) Every discount buying club shall obtain and maintain a bond from a surety company licensed to do business in North Carolina. Such bond shall be in an amount not less than one hundred times the one-time or annual membership fee, or fifty thousand dollars ($50,000), whichever is greater.

(b) Every discount buying club shall hold advance payments for goods and services in trust in a separate account used solely for that purpose. The funds in such account shall be held free from all liens. Records of such account shall be kept by the buying club in the regular course of its business sufficient to identify the amount held for each customer, the dates of the receipt and withdrawal of funds, and the purpose of withdrawal. Such records must be retained for a period not less than four years following withdrawal. Funds may not be withdrawn from the trust account unless and until (i) the ordered goods have been actually delivered to the customer or consigned to a certified public carrier, or (ii) ordered services have been provided in full, or (iii) the buying club has refunded the customer's payment. Provided, the discount buying club shall not be required to comply with the foregoing trust account requirements if the discount buying club meets the requirements of G.S. 66-132(b), bills its customers through a credit card account and obtains and maintains an additional bond in the amount of fifty thousand dollars ($50,000) from a surety company licensed to do business in North Carolina.

(c) Any person who is damaged by any violation of this Article, or by any breach by the discount buying club of its contract, may bring an action against the bond, provided that the aggregate liability of the surety shall not exceed the amount of the bond.

(d) **(Effective October 1, 1994 — See editor's note)** Violations of subsections (a) or (b) of this section shall constitute a Class I felony. (1981, c. 594, s. 1; 1989, c. 495, ss. 2, 3; 1993, c. 539, s. 1282; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class I felony" for "Class J felony" in subsection (d).

ARTICLE 23.

Rental Referral Agencies.

§ 66-145. (See editor's note for date change) Bond or trust account required.

(a) Every rental referral agency before beginning business shall establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. Each deposit to be applied towards a fee collected under G.S. 66-143(b) shall be placed in the trust account and shall be withdrawn only to refund the deposit to the applicant pursuant to G.S. 66-143(b)(2) or when a fee is earned by the agency as provided in G.S. 66-143(a).

(b) A rental referral agency may elect to post a bond in lieu of the trust account required by this section. The amount of the bond shall at no time be less than the amount that would be required by this section to be held in trust. In no event, however, shall the bond be less than five thousand dollars ($5,000). The rental referral agency shall file the bond with the clerk of the superior court of the county in which its principal place of business is located.

(c) Any person who is damaged by any violation of this Article, or by any breach by the rental referral agency of its contract, may bring an action for the remedies referred to and provided in G.S. 66-146 against the bond or trust account; provided that the aggregate liability of the surety or trustee shall not exceed the amount of the bond or trust account.

(d) **(Effective October 1, 1994 — See editor's note)** Violation of subsections (a) or (b) of this section shall constitute a Class 1 misdemeanor. (1981, c. 610, s. 1; 1993, c. 539, s. 524; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (d).

ARTICLE 24.

Trade Secrets Protection Act.

§ 66-152. Definitions.

CASE NOTES

Section 75-1.1 Applicable to Violations of this Act. — Section 75-1.1 is applicable to violations of the Trade Secrets Protection Act. Drouillard v. Keister Williams Newspaper Servs., Inc., 108 N.C. App. 169, 423 S.E.2d 324 (1992), cert. denied, 333 N.C. 344, 427 S.E.2d 617 (1993).

Establishing a Trade Secret. — Subdivision (3) of this section, defines a trade secret as valuable business or technical information that a) is neither "generally known nor readily ascertainable through independent development or reverse engineering," and b) has been subject to "efforts that are reasonable under the circumstances to maintain its secrecy." In order to resist a motion for summary judgment, plaintiff must allege facts sufficient to allow a reasonable finder of fact to conclude that his concept satisfies these two requirements. Bank Travel Bank v. McCoy, 802 F. Supp. 1358, E.D.N.C. 1992.

A prima facie case of misappropriation existed so as to support a preliminary injunction where defendant helped to develop software during his employ with plaintiff, had access to copies of the software source code prior to his resignation, and where it was practically impossible to make any substantial modification to the software without access to the source code. Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

Quoted in North Carolina Elec. Membership Corp. v. North Carolina Dep't of Economic & Community Dev., 108 N.C. App. 711, 425 S.E.2d 440 (1993).

§ 66-154. Remedies.

CASE NOTES

Failure to Provide Evidence of Misappropriation. — Where appellant presented sufficient evidence that it was likely to succeed in showing that certain documents sought by an adverse party in an arbitration proceeding contained trade secrets, but it offered no evidence of misappropriation, it failed to show a likelihood of success on the merits with respect to any claim brought pursuant to the Trade Secret Protection Act to enjoin disclosure of the documents. North Carolina Elec. Membership Corp. v. North Carolina Dep't of Economic & Community Dev., 108 N.C. App. 711, 425 S.E.2d 440 (1993).

Quoted in Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

§ 66-155. Burden of proof.

CASE NOTES

A prima facie case of misappropriation existed so as to support a preliminary injunction where defendant helped to develop software during his employ with plaintiff, had access to copies of the software source code prior to his resignation, and where it was practically impossible to make any substantial modification to the software without access to the source code. Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

ARTICLE 25.

Regulation of Precious Metal Businesses.

§ 66-167. (Effective October 1, 1994 — See editor's note) Perjury; punishment.

Any person who shall willfully commit perjury in any application for a permit or exemption filed pursuant to this Article shall be guilty of a Class 2 misdemeanor. (1981, c. 956, s. 1; 1993, c. 539, s. 525; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 2" preceding "misdemeanor".

§ 66-169. (Effective October 1, 1994 — See editor's note) Records to be kept.

Every dealer to whom a permit has been issued pursuant to G.S. 66-165 shall maintain a tightly bound book or books (not looseleaf), with pages numbered in sequence, in which shall be recorded, at the time of any purchase of precious metal, a serially numbered account and description of the specific items purchased, including, if applicable, the manufacturer's name, the model, the model number, the serial number, and any engraved numbers or initials found on the items, the date of the transaction, and the name, sex, race, residence, telephone number and driver's license number, if any, of the person selling the items purchased. Both the dealer and the seller shall sign the record entry. In the event the seller cannot furnish his driver's license, passport, or military identification card bearing his photograph, the dealer shall require two forms of positive identification.

The record book shall be open at all reasonable times to inspection on the premises by law-enforcement agencies and shall not be destroyed until two years following the last transaction which the record book reflects. A copy of each record book entry shall be filed within 48 hours of the transaction in the office of the local law-enforcement agency. Mailing the required copy to the local law-enforcement agency within 48 hours shall constitute compliance with this section.

The files of local law-enforcement agencies which contain such copies of record book entries shall not be subject to inspection and examination as authorized by G.S. 132-6. Any public official or employee who shall knowingly and willfully permit any person to have access to or custody or possession of any portion of such files, unless the person is one specifically authorized by the local law-enforcement agency to have access thereto for purposes of law-enforcement investigation or civil or criminal proceedings, shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined in the discretion of the court but not in excess of five hundred dollars ($500.00).

Every merchant to whom an exemption has been issued pursuant to G.S. 66-166 shall maintain a book in which shall be recorded, at the time of any purchase of precious metal, a description of the specific items purchased and the date of the transaction. This book shall be open at all reasonable times to inspection on the premises by law-enforcement agencies and shall not be destroyed until two years following the last transaction which the record book reflects. (1981, c. 956, s. 1; 1993, c. 539, s. 526; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 3" preceding "misdemeanor" and inserted "only" following "upon conviction shall" in the second sentence of the third paragraph.

§ 66-172. (Effective October 1, 1994 — See editor's note) Penalties.

Any dealer who violates the provisions of this Article shall be deemed guilty of a Class 2 misdemeanor. In addition any dealer so convicted shall be ineligible for a dealer's permit for a period of three years from the date of conviction. Each and every violation shall constitute a separate and distinct offense. (1981, c. 956, s. 1; 1993, c. 539, s. 527; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor and upon conviction shall be fined not more than five hundred dollars ($500.00) or imprisoned for not more than six months, or both" in the first sentence.

§ 66-173. (Effective October 1, 1994 — See editor's note) Portable smelters prohibited.

It shall be unlawful for any person to possess or operate a smelter in any mobile home, trailer, camper, or other vehicle or structure not permanently affixed to the ground, for the purpose of refining precious metals. Violation of the provisions of this section shall constitute a Class 2 misdemeanor. (1981, c. 956, s. 1; 1993, c. 539, s. 528; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor and shall be punishable by a fine of not more than five hundred dollars ($500.00) or imprisoned for not more than six months, or both" in the second sentence.

ARTICLE 27.

Sales Representative Commissions.

§ 66-190. Definitions.

CASE NOTES

Quoted in D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

§ 66-192. Civil liability.

CASE NOTES

Subsection (c) of this section is a "Special Jurisdictional Statute" as that term is used in § 1-75.4. D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

Where plaintiff and defendants entered into a sales representation agreement whereby plaintiff agreed to act as a sales representative for defendants in this and other states and in return, defendants agreed to pay commissions to plaintiff, defendants were within the provisions of § 1-75.4(5)(a) and (b), a statute that is to be liberally construed. D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

ARTICLE 30.

Credit Repair Services Act.

§ 66-225. (See editor's note for date change) Violations.

(a) If a credit repair business uses any untrue or misleading statements in connection with a credit repair contract, fails to fully comply with the requirements of this Article, or fails to comply with the terms of the contract or any obligation arising therefrom, then, upon written notice to the credit repair business, the consumer may void the contract, and shall be entitled to receive from the credit repair business all sums paid to the credit repair business, and recover any additional damages including reasonable attorneys' fees.

(b) Any waiver by a consumer of any of the provisions of this Article shall be deemed void and unenforceable by a credit repair business.

(c) Upon complaint of any person that a credit repair business has violated the provisions of this Article, the superior court shall have jurisdiction to enjoin that defendant from further such violations.

(d) In a proceeding involving this Article, the burden of proving an exemption or an exception from the definition of a credit repair business shall be borne by the person claiming the exemption or exception.

(e) The remedies provided herein shall be in addition to any other remedies provided for by law or in equity.

(f) **(Effective October 1, 1994 — See editor's note)** The violation of any provision of this Article shall constitute an unfair trade practice under G.S. 75-1.1 and the violation of any provision of this Article shall constitute a Class I felony. (1991, c. 327, s. 1; 1993, c. 539, s. 1283; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class I felony" for "Class J felony" in subsection (f).

Chapter 67.

Editor's Note. — The legislation and annotations affecting Chapter 67 have been included in a recently published replacement chapter.

Chapter 68.

Fences and Stock Law.

ARTICLE 3.

Livestock Law.

§ 68-16. (Effective October 1, 1994 — See editor's note) Allowing livestock to run at large forbidden.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 68-21. (Effective October 1, 1994 — See editor's note) Illegally releasing or receiving impounded livestock misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 68-22. (Effective October 1, 1994 — See editor's note) Impounded livestock to be fed and watered.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 68-24. (Effective October 1, 1994 — See editor's note) Penalties for violation of this Article.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 68-25. (Effective October 1, 1994 — See editor's note) Domestic fowls running at large after notice.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 4.

Stock along the Outer Banks.

§ 68-44. (Effective October 1, 1994 — See editor's note) Penalty for violation of § 68-42.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 69.

Fire Protection.

Article 1.

Investigation of Fires and Inspection of Premises.

Sec.

69-1 through 69-7.1. [Recodified.]

Article 2.

Fire Escapes.

69-8 through 69-13. [Repealed.]

Article 3.

State Volunteer Fire Department.

69-14 through 69-25. [Recodified.]

Article 3A.

Rural Fire Protection Districts.

69-25.5. Methods of providing fire protection.

Sec.

69-25.11. Changes in area of district.

69-25.15. When district or portion thereof annexed by municipality furnishing fire protection.

Article 4.

Hotels; Safety Provisions.

69-26 through 69-38. [Recodified.]

Article 5.

Authority and Liability of Firemen.

69-39, 69-39.1. [Recodified.]

Article 6.

Mutual Aid between Fire Departments.

69-40. [Recodified.]

ARTICLE 1.

Investigation of Fires and Inspection of Premises.

§§ 69-1 through 69-7.1: Recodified as Article 79 of Chapter 58.

Editor's Note. — This Article was recodified as Article 79 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

ARTICLE 2.

Fire Escapes.

§§ 69-8 through 69-13: Repealed by Session Laws 1987, c. 864, s. 51, effective August 14, 1987.

Article 3.

State Volunteer Fire Department.

§§ 69-14 through 69-25: Recodified as Article 80 of Chapter 58.

Editor's Note. — This Article was recodified as Article 80 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

Article 3A.

Rural Fire Protection Districts.

§ 69-25.1. Election to be held upon petition of voters.

Local Modification. — (As to Article 3A) Alexander: 1993, c. 237, s. 1; Caldwell, Chatham: 1985, c. 502; 1985 (Reg. Sess., 1986), c. 940; 1987, c. 235; Cleveland: 1987 (Reg. Sess., 1988), c. 960; Harnett; 1989 (Reg. Sess., 1990), c. 932; Lee: 1985, c. 502; 1985 (Reg. Sess., 1986), c. 940; 1987, c. 235; Randolph: 1989 (Reg. Sess., 1990), c. 993; Robeson: 1987, c. 560; Wake: 1987 (Reg. Sess., 1988), c. 959; Wayne: 1985, c. 502; 1985 (Reg. Sess., 1986), c. 940; 1987, c. 235; town of Richfield: 1989 (Reg. Sess., 1990), c. 943, s. 1.

For additional local modifications to this section, see the main pamphlet.

§ 69-25.5. Methods of providing fire protection.

Upon the levy of such tax, the board of county commissioners shall, to the extent of the taxes collected hereunder, provide fire protection for the district —

(1) By contracting with any incorporated city or town, with any incorporated nonprofit volunteer or community fire department, or with the Department of Environment, Health, and Natural Resources to furnish fire protection, or

(2) By furnishing fire protection itself if the county maintains an organized fire department, or

(3) By establishing a fire department within the district, or

(4) By utilizing any two or more of the above listed methods of furnishing fire protection. (1951, c. 820, s. 5; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(11).)

Effect of Amendments. — The 1989 amendment, effective July 1, 1989, substituted "Environment, Health, and Natural Resources" for "Natural Resources and Community Development" in subdivision (1).

CASE NOTES

Contracting with Incorporated Nonprofit Volunteer Fire Department. — This section specifically allows county commissioners to contract with an incorporated nonprofit volunteer fire department to provide fire protection. Knotville Volunteer Fire Dep't, Inc. v. Wilkes County, 85 N.C. App. 598, 355

S.E.2d 139, cert. denied and appeal dismissed, 320 N.C. 632, 360 S.E.2d 88, 89 (1987).

Liability of Nonprofit Fire Company in a Nonfire Related Rescue Attempt. — A nonprofit fire company employed by the county was liable for plaintiff's injuries in a nonfire related rescue attempt only to the extent of their insurance coverage, since they had governmental immunity up to their insurance coverages and were engaged in duties other than the suppression of a reported fire. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

§ 69-25.8. Authority, rights, privileges and immunities of counties, etc., performing services under Article.

CASE NOTES

Immunity of Fire Departments. — This section ensures that all fire departments engaged in activities authorized by this chapter receive equivalent statutory and sovereign immunity. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

Liability of Nonprofit Fire Company in a Nonfire Related Rescue Attempt. — A nonprofit fire company employed by the county was liable for plaintiff's injuries in a nonfire related rescue attempt only to the extent of their insurance coverage, since they had governmental immunity up to their insurance coverages and were engaged in duties other than the suppression of a reported fire. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

§ 69-25.11. Changes in area of district.

After a fire protection district has been established under the provisions of this Article and fire protection commissioners have been appointed, changes in the area may be made as follows:

(1) The area of any fire protection district may be increased by including within the boundaries of the district any adjoining territory upon the application of the owner, or a two-thirds majority of the owners, of the territory to be included, the unanimous recommendation in writing of the fire protection commissioners of said district, the approval of a majority of the members of the board of directors of the corporation furnishing fire protection to the district, and the approval of the board or boards of county commissioners in the county or counties in which said fire protection district is located. However, before said fire protection district change is approved by the county commissioners, notice shall be given once a week for two successive calendar weeks in a newspaper having general circulation in said district, and notice shall be posted at the courthouse door in each county affected, and at three public places in the area to be included, said notices inviting interested citizens to appear at a designated meeting of said county commissioners, said notice to be published the first time and posted not less than fifteen days prior to the date fixed for hearing before the county commissioners.

(2) The area of any fire protection district may be decreased by removing therefrom any territory, upon the application of the owner or owners of the territory to be removed, the

unanimous recommendation in writing of the fire protection commissioners of said district, the approval of a majority of the members of the board of directors of the corporation furnishing fire protection to the district, and the approval of the board or boards of county commissioners of the county or counties in which the district is located.

(3) In the case of adjoining fire districts having in effect the same rate of tax for fire protection, the board of county commissioners, upon petition of the fire protection commissioners and the boards of directors of the corporations furnishing fire protection in the districts affected, shall have the authority to relocate the boundary lines between such fire districts in accordance with the petition or in such other manner as to the board may seem proper. Upon receipt of such petition, the board of county commissioners shall set a date and time for a public hearing on the petition, and notice of such hearing shall be published in some newspaper having general circulation within the districts to be affected once a week for two weeks preceding the time of the hearing. Such hearings may be adjourned from time to time and no further notice is required of such adjourned hearings. In the event any boundaries of fire districts are altered or relocated under this section, the same shall take effect at the beginning of the next succeeding fiscal year after such action is taken.

(4) In the case of adjoining fire districts having in effect a different rate of tax for fire protection, the board of county commissioners, upon petition of two thirds of the owners of the territory involved and after receiving a favorable recommendation of the fire protection commissioners and the boards of directors of the corporations furnishing fire protection in the districts affected, may transfer such territory from one district to another and therefore relocate the boundary lines between such fire districts in accordance with the petition or in such other manner as the board may deem proper. Upon receipt of such petition, the board of county commissioners shall set a date and time for a public hearing on the petition, and notice of such hearing shall be published in some newspaper having general circulation within the districts to be affected once a week for two weeks preceding the time of the hearing. Such hearings may be adjourned from time to time and no further notice is required of such adjourned hearings. In the event any boundaries of fire districts are relocated under this section, the same shall take effect at the beginning of the next succeeding fiscal year after such action is taken.

(5) The area of any fire protection district may be increased by including within the boundaries of the district any adjoining territory lying within the corporate limits of the city if the territory is not already included within a fire protection district, provided both the city governing body and the county commissioners of the county or counties in which the fire protection district is located all agree by resolution to such inclusion. (1955, c. 1270; 1959, c. 805, s. 5; 1965, cc. 625, 1101; 1987, c. 711, s. 2.)

Effect of Amendments. — The 1987 amendment, effective July 31, 1987, added subdivision (5).

CASE NOTES

Exclusive Means of Altering Established Boundaries. — After a district has been created, the only ways to alter the established boundaries are listed in this section. Knotville Volunteer Fire Dep't, Inc. v. Wilkes County, 85 N.C. App. 598, 355 S.E.2d 139, cert. denied and appeal dismissed, 320 N.C. 632, 360 S.E.2d 88, 89 (1987).

§ 69-25.15. When district or portion thereof annexed by municipality furnishing fire protection.

(a) When the whole or any portion of a fire protection district has been annexed by a municipality furnishing fire protection to its citizens, then such fire protection district or the portion thereof so annexed shall immediately thereupon cease to be a fire protection district or a portion of a fire protection district; and such district or portion thereof so annexed shall no longer be subject to G.S. 69-25.4 authorizing the board of county commissioners to levy and collect a tax in such district for the purpose of furnishing fire protection therein.

(b) Nothing herein shall be deemed to prevent the board of county commissioners from levying and collecting taxes for fire protection in the remaining portion of a fire protection district not annexed by a municipality, as aforesaid.

(c) When all or part of a fire protection district is annexed, and the effective date of the annexation is a date other than a date in the month of June, the amount of the fire protection district tax levied on property in the district for the fiscal year in which municipal taxes are prorated under G.S. 160A-58.10 shall be multiplied by the following fraction: the denominator shall be 12 and the numerator shall be the number of full calendar months remaining in the fiscal year following the day on which the annexation becomes effective. For each owner, the product of the multiplication is the prorated fire protection payment. The finance officer of the city shall obtain from the assessor or tax collector of the county where the annexed territory was located a list of the owners of property on which fire protection district taxes were levied in the territory being annexed, and the city shall, no later than 90 days after the effective date of the annexation, pay the amount of the prorated fire protection district payment to the owners of that property. Such payments shall come from any funds not otherwise restricted by law.

(d) Whenever a city is required to make fire protection district tax payments by subsection (c) of this section, and the city has paid or has contracted to pay to a rural fire department funds under G.S. 160A-37.1 or G.S. 160A-49.1, the county shall pay to the city from funds of the rural fire protection district an amount equal to the amount paid by the city (or to be paid by the city) to a rural fire department under G.S. 160A-37.1 or G.S. 160A-49.1 on account of annexation of territory in the rural fire protection district for the number of months in that fiscal year used in calculating the numerator under subsection (c) of this section; provided that the required payments by the county to the city shall not exceed the total of fire protection district payments made to taxpayers in the district on account of that annexation. (1957, c. 1219; 1985, c. 707, ss. 1, 2; 1987, c. 45, s. 1.)

Local Modification. — Town of Richfield: 1989 (Reg. Sess., 1990), c. 943, s. 2.

For additional local modifications to this section, see the main pamphlet.

Effect of Amendments. — The 1987 amendment, effective April 3, 1987, substituted "assessor" for "tax supervisor" in the third sentence of subsection (c).

§ 69-25.17. Validation of fire protection funds appropriated in providing rescue and ambulance services.

CASE NOTES

This section and § 58-82-5(c) recognize that fire departments provide rescue and ambulance services. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

Liability of Nonprofit Fire Company in Nonfire Related Rescue Attempt. — A nonprofit fire company employed by the county was liable for plaintiff's injuries in a nonfire related rescue attempt only to the extent of their insurance coverage, since they had governmental immunity up to their insurance coverages and were engaged in duties other than the suppression of a reported fire. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

Nonprofit Fire Department Entitled to Same Immunity Afforded Other Fire Departments. — Nonprofit corporation employed by a county as a fire department engaged in statutorily authorized services is entitled to receive the same immunity normally afforded to other fire departments in North Carolina. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

ARTICLE 4.

Hotels; Safety Provisions.

§§ 69-26 through 69-38: Recodified as Article 81 of Chapter 58.

Editor's Note. — This Article was recodified as Article 81 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

Sections 69-26 through 69-31 and 69-35 through 69-37 were repealed by Session Laws 1987, c. 864, s. 52.

ARTICLE 5.

Authority and Liability of Firemen.

§§ 69-39, 69-39.1: Recodified as Article 82 of Chapter 58.

Editor's Note. — This Article was recodified as Article 82 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

ARTICLE 6.

Mutual Aid between Fire Departments.

§ 69-40: Recodified as Article 83 of Chapter 58.

Editor's Note. — This Article was recodified as Article 83 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

Chapter 70.

Indian Antiquities, Archaeological Resources and Unmarked Human Skeletal Remains Protection.

Article 1.

Indian Antiquities.

Sec.
70-4. (Effective October 1, 1994 — See editor's note) Destruction or sale of relic from public lands made misdemeanor.

Article 3.

Unmarked Human Burial and Human Skeletal Remains Protection Act.

Sec.
70-40. (See editor's note for date change) Penalties.

ARTICLE 1.

Indian Antiquities.

§ 70-4. (Effective October 1, 1994 — See editor's note) Destruction or sale of relic from public lands made misdemeanor.

Any person who shall excavate, disturb, remove, destroy or sell any Indian relic or artifact, or any of the contents of any mound or burial ground, on or from any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, except with the written approval of the director of the State Museum or the Secretary of the Department of Cultural Resources, shall be guilty of a Class 1 misdemeanor. (1935, c. 198, s. 4; 1973, c. 476, s. 48; 1993, c. 539, s. 542; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor".

ARTICLE 3.

Unmarked Human Burial and Human Skeletal Remains Protection Act.

§ 70-40. (See editor's note for date change) Penalties.

(a) **(Effective October 1, 1994 — See editor's note)** Violation of the provisions of G.S. 70-29 is a Class 1 misdemeanor.

(b) Violation of the provisions of G.S. 70-37(a) is a Class H felony. (1981, c. 853, s. 2; 1993, c. 539, s. 543; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (a).

Chapter 71A.

Indians.

§ 71A-1. Cherokee Indians of Robeson County; rights and privileges.

Legal Periodicals. — For article on criminal jurisdiction on the North Carolina Cherokee Indian reservation, see 24 Wake Forest L. Rev. 335 (1989).

§ 71A-3. Lumbee Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

Legal Periodicals. — For article on criminal jurisdiction on the North Carolina Cherokee Indian reservation, see 24 Wake Forest L. Rev. 335 (1989).

Chapter 72.

Editor's Note. — The legislation and annotations affecting Chapter 72 have been included in a recently published replacement chapter.

Chapter 73.

Mills.

Article 1.

Public Mills.

Sec.
73-4. (Effective October 1, 1994 — See editor's note) Keeping false toll dishes misdemeanor.

ARTICLE 1.

Public Mills.

§ 73-4. (Effective October 1, 1994 — See editor's note) Keeping false toll dishes misdemeanor.

If any owner, by himself or servant, keeping any mill, shall keep any false toll dishes, he shall be guilty of a Class 1 misdemeanor. (1777, c. 122, s. 11; R.C., c. 71, s. 7; Code, s. 1848; Rev., s. 3679; C.S., s. 2534; 1993, c. 539, s. 552; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor".

Chapter 74.

Editor's Note. — The legislation and annotations affecting Chapter 74 have been included in a recently published replacement chapter.

Chapter 74C.

Private Protective Services.

Article 1.

Private Protective Services Board.

Sec.
74C-12. Denial, suspension, or revocation of license, registration, or permit.
74C-17. (See editor's note for date change) Enforcement.

ARTICLE 1.

Private Protective Services Board.

§ 74C-2. Licenses required.

CASE NOTES

Cited in Cowan v. North Carolina Private Protective Servs. Bd., 98 N.C. App. 498, 391 S.E.2d 217 (1990).

§ 74C-3. Private protective services profession defined.

CASE NOTES

Newspaper reporter's research activities were investigative, for the "purpose of obtaining information." Cowan v. North Carolina Private Protective Servs. Bd., 98 N.C. App. 498, 391 S.E.2d 217 (1990), decided prior to the 1989 amendment.

Consideration of Private Investigative Work. — While the Private Protective Services Board has the statutory power to grant or deny licenses, it must still act within the scope of its statutory powers. The statutes direct the Board to consider all evidence of experience that is investigative in nature to determine if the applicant had the necessary experience. Therefore, where the Board recognized that petitioner had worked as a runner for a bail bondsman, but refused to consider that work in satisfaction of the investigative experience requirement, the Board erroneously disregarded the mandate of subdivision (a)(8) to consider all private investigative work. Boston v. North Carolina Private Protective Servs. Bd., 96 N.C. App. 204, 385 S.E.2d 148 (1989).

§ 74C-5. Powers of the Board.

OPINIONS OF ATTORNEY GENERAL

The Private Protective Services Board has the authority to inspect the records of all licensees as part of an evaluation conducted pursuant to subdivision (3). See opinion of Attorney General to James F. Kirk, Administrator, N.C. Private Protective Services Board, 60 N.C.A.G. 12 (1990).

§ 74C-8. Applications for an issuance of license.

CASE NOTES

Cited in Boston v. North Carolina Private Protective Servs. Bd., 96 N.C. App. 204, 385 S.E.2d 148 (1989).

§ 74C-9. Form of license; term; renewal; posting; branch offices; not assignable; late renewal fee.

OPINIONS OF ATTORNEY GENERAL

Permit Fees. — The Private Protective Services Board has the authority pursuant to subdivision (e)(8) to charge private investigators a full fee for an armed security guard firearm registration permit. See opinion of Attorney General to James F. Kirk, Administrator, N.C. Private Protective Services Board, 60 N.C.A.G. 12 (1990).

§ 74C-12. Denial, suspension, or revocation of license, registration, or permit.

(a) The Board may, after compliance with Chapter 150B of the General Statutes, deny, suspend or revoke a license, registration, or permit issued under this Chapter if it is determined that the applicant, licensee, registrant, or permit holder has:

(1) Made any false statement or given any false information in connection with any application for a license, registration, or permit or for the renewal or reinstatement of a license, registration, or permit;

(2) Violated any provision of this Chapter;

(3) Violated any rule promulgated by the Board pursuant to the authority contained in this Chapter;

(4) Repealed by Session Laws 1989, c. 759, s. 10, effective October 1, 1989;

(5) Impersonated or permitted or aided and abetted any other person to impersonate a law enforcement officer of the United States, this State, any other state, or any political subdivision of a state;

(6) Engaged in or permitted any employee to engage in a private protective services profession when not lawfully in possession of a valid license issued under the provisions of this Chapter;

(7) Willfully failed or refused to render to a client service as agreed between the parties and for which compensation has been paid or tendered in accordance with the agreement of the parties;

(8) Knowingly made any false report to the employer or client for whom information is being obtained;

(9) Committed an unlawful breaking or entering, assault, battery, or kidnapping;

(10) Knowingly violated or advised, encouraged, or assisted the violation of any court order or injunction in the course of business as a licensee;

(11) Repealed by Session Laws 1989, c. 759, s. 10, effective October 1, 1989;

(12) Undertaken to give legal advice or counsel or to in any way falsely represent that he is representing any attorney or he is appearing or will appear as an attorney in any legal proceeding;

(13) Issued, delivered, or uttered any simulation of process of any nature which might lead a person or persons to believe that such simulation — written, printed, or typed — may be a summons, warrant, writ or court process, or any pleading in any court proceeding;

(14) Failed to make the required contribution to the Private Protective Services Recovery Fund or failed to maintain the certificate of liability insurance required by this Chapter;

(15) Violated the firearm provisions set forth in this Chapter;

(16) Repealed by Session Laws 1989, c. 759, s. 10, effective October 1, 1989;

(17) Failed to notify the Administrator by a business entity other than a sole proprietorship licensed pursuant to this Chapter of the cessation of employment of the business entity's qualifying agent within the time set forth in this Chapter;

(18) Failed to obtain a substitute qualifying agent by a business entity within 30 days after its qualifying agent has ceased to serve as the business entity's qualifying agent;

(19) Been judged incompetent by a court having jurisdiction under Chapter 35A or former Chapter 35 of the General Statutes or committed to a mental health facility for treatment of mental illness, as defined in G.S. 122C-3, by a court under G.S. 122C-271;

(20) Failed or refused to offer a report to a client within 30 days of the client's written request;

(21) Been previously denied a license, registration, or permit under this Chapter or previously had a license, registration, or permit revoked for cause;

(22) Engaged in a private protective services profession under a name other than the name under which the license was obtained under the provisions of this Chapter;

(23) Divulged to any person, except as required by law, any information acquired by him except at the direction of the employer or client for whom the information was obtained. A licensee may divulge to any law enforcement officer or district attorney or his representative any information the law enforcement officer may require to investigate a criminal offense with the prior approval and consent of the client;

(24) Fraudulently held himself out as employed by or licensed by the State Bureau of Investigation or any other governmental authority;

(25) Intemperate habits or lacks good moral character. The acts that are prima facie evidence of intemperate habits or lack of good moral character under G.S. 74C-8(d)(2) are prima facie evidence of the same under this subdivision;

(26) Advertised or solicited business using a name other than that in which the license was issued;

(27) Worn, carried, or accepted any badge or shield purporting to indicate that the person is a private detective or private investigator while licensed under the provisions of this Chapter as a private investigator.

(b) The denial, revocation, or suspension of a license, registration, or permit by the Board shall be in writing, be signed by the Administrator of the Board, and state the grounds upon which the Board decision is based. The aggrieved person shall have the right to appeal from this decision as provided in Chapter 150B of the General Statutes.

(c) The following persons may not be issued a license, registration, or permit under this Chapter:

(1) A sworn court official.

(2) A holder of a company police commission under Chapter 74E of the General Statutes. (1979, c. 818, s. 2; 1981, c. 807, s. 6; 1987, c. 550, s. 20; c. 657, s. 6; 1989, c. 759, s. 10; 1991 (Reg. Sess., 1992), c. 1043, s. 5.)

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective July 25, 1992, substituted "Chapter 74E" for "Chapter 74A" in subdivision (c)(2).

§ 74C-13. Armed security guard required to have firearm registration permit; security guard training.

OPINIONS OF ATTORNEY GENERAL

The definition of an armed security guard as set forth in subdivision (a)(1) includes a private investigator who carries a weapon. See opinion of Attorney General to James F. Kirk, Administrator, N.C. Private Protective Services Board, 60 N.C.A.G. 12 (1990).

§ 74C-17. (See editor's note for date change) Enforcement.

(a) The Board is authorized to apply in its own name to any judge of the superior court of the General Court of Justice for an injunction in order to prevent any violation or threatened violation of the provisions of this Chapter.

(b) **(Effective October 1, 1994 — See editor's note)** Any person, firm, association, or corporation or their agents and employees violating any of the provisions of this Chapter or knowingly violating any rule promulgated to implement this Chapter shall be guilty of a Class 1 misdemeanor. The Attorney General, or his representative, shall have concurrent jurisdiction with the district attorneys of this State to prosecute violations of this Chapter.

(c) In lieu of revocation or suspension of a license or permit under G.S. 74C-12, a civil penalty of not more than two thousand dollars ($2,000) may be assessed by the Board against any person or business who violates any provision of this Chapter or any rule of the Board adopted pursuant to this Chapter. In determining the amount of any penalty, the Board shall consider the degree and extent of harm caused by the violation.

(d) Proceedings for the assessment of civil penalties under this section shall be governed by Chapter 150B of the General Statutes. If the person assessed a civil penalty fails to pay the penalty to the Board, the Board may institute an action in the superior court of the county in which the person resides or has his principal place of business to recover the unpaid amount of the penalty. An action to recover a civil penalty under this section shall not relieve any party from any other penalty prescribed by law. (1979, c. 818, s. 2; 1983, c. 794, s. 6; 1989, c. 759, s. 14; 1993, c. 539, s. 557; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. —

The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and punishable by a fine of up to five hundred dollars ($500.00), by imprisonment for a term not to exceed one year, or both, in the discretion of the court" in the first sentence of subsection (b).

Legal Periodicals. — For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'", see 68 N.C.L. Rev. 1035 (1990).

§ 74C-21. Law enforcement officer provisions.

CASE NOTES

Cited in State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992).

ARTICLE 2.

Private Protective Services Recovery Fund.

§ 74C-31. Application for payment out of Fund; hearing grounds.

Editor's Note. — The historical citation in parentheses at the end of this section in the main volume should read: "(1983, c. 673, § 2; 1987, c. 827, s. 1; 1989, c. 759, s. 17)."

Chapter 74D.

Alarm Systems.

Article 1.

Alarm Systems Licensing Act.

Sec.
74D-11. (See editor's note for date change) Enforcement.

ARTICLE 1.

Alarm Systems Licensing Act.

§ 74D-11. (See editor's note for date change) Enforcement.

(a) The Board is authorized to apply in its own name to any judge of the Superior Court of the General Court of Justice for an injunction in order to prevent any violation or threatened violation of the provisions of this Chapter.

(b) **(Effective October 1, 1994 — See editor's note)** Any person, firm, association, corporation, or department or division of a firm, association or corporation, or their agents and employees violating any of the provisions of this Chapter or knowingly violating any rule promulgated to implement this Chapter shall be guilty of a Class 1 misdemeanor. The Attorney General, or his representative, shall have concurrent jurisdiction with the district attorneys of this State to prosecute violations of this Chapter.

(c) The regulation of alarm systems businesses shall be exclusive to the Board; however, any city or county shall be permitted to require an alarm systems business operating within its jurisdiction to register and to supply information regarding its license, and may adopt an ordinance to require users of alarm systems to obtain revocable permits when alarm usage involves automatic signal transmission to a law-enforcement agency.

(d) In lieu of revocation of suspension of a license or registration under G.S. 74D-10, a civil penalty of not more than two thousand dollars ($2,000) may be assessed by the Board against any person who violates any provision of this Chapter, or any rule of the Board adopted pursuant to this Chapter. In determining the amount of any penalty, the Board shall consider the degree and extent of harm caused by the violation. All penalties collected under this section will be deposited in the General Fund.

(e) Proceedings for the assessment of civil penalties shall be governed by Chapter 150B of the General Statutes. If the person assessed a penalty fails to pay the penalty to the Board, the Board may institute an action in the superior court of the county in which the person resides or has his principal place of business to recover the unpaid amount of the penalty. An action to recover a civil penalty under this section shall not relieve any party from any other penalty prescribed by law. (1983, c. 786, s. 1; 1989, c. 730, s. 8; 1991 (Reg. Sess., 1992), c. 953, s. 10; 1993, c. 539, s. 558; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. —

The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and punishable by a fine of up to five hundred dollars ($500.00), by imprisonment for a term not to exceed one year, or by both, in the discretion of the court" in the first sentence of subsection (b).

Chapter 74E.

Company Police Act.

Sec.
74E-13. Penalties and enforcement.

§ 74E-1. Title.

CASE NOTES

For a case discussing the legislative purpose and constitutionality of former Chapter 74A, see State v. Pendleton, 112 N.C. App. 171, 435 S.E.2d 100 (1993), cert. denied, 335 N.C. 563, 441 S.E.2d 131 (1994).

§ 74E-13. Penalties and enforcement.

(a) No private person, firm, association, or corporation, and no public institution, agency, or other entity shall engage in, perform any services as, or in any way hold itself out as a company police agency or engage in the recruitment or hiring of company police officers without having first complied with the provisions of this Chapter. Any person, firm, association, or corporation, or their agents and employees violating any of the provisions of this Chapter shall be guilty of a Class 1 misdemeanor.

(b) The Company Police Program may apply in its own name to the superior court for an injunction to prevent any violation or threatened violation of this Chapter or a rule adopted under this Chapter, and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed because of the violation. The venue for an action brought under this subsection shall be in any county selected by the Attorney General.

(c) This section does not relieve a company police agency from any civil liability for the acts of its company police officers in exercising or attempting to exercise the powers conferred by this Chapter. (1991 (Reg. Sess., 1992), c. 1043, s. 1; 1993 (Reg. Sess., 1994), c. 767, s. 26.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, substituted "Class 1 misdemeanor" for "misdemeanor and punishable by a fine, imprisonment for a term not to exceed two years, or both, in the discretion of the court" in subsection (a).

Chapter 75.

Editor's Note. — The legislation and annotations affecting Chapter 75 have been included in a recently published replacement chapter.

Chapter 75A.

Editor's Note. — The legislation and annotations affecting Chapter 75A have been included in a recently published replacement chapter.

Chapter 75D.

Racketeer Influenced and Corrupt Organizations.

Sec.
75D-6. (Effective October 1, 1994 — See editor's note) Power to compel examination.

Sec.
75D-7. (Effective October 1, 1994 — See editor's note) False testimony.

§ 75D-1. Short title.

CASE NOTES

Cited in Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993).

§ 75D-3. Definitions.

Editor's Note. —

Sections 14-78.1, 14-86, and 14-201 referred to above have been repealed by Session Laws 1994 Extra Session, c. 14, ss. 72(1), 72(3), and 72(10), effective October 1, 1994.

CASE NOTES

Racketeering Activity. — Where defendant was convicted of gambling in houses of public entertainment in violation of § 14-293, operating or possessing gambling devices in violation of § 14-302, and selling or possessing numbers tickets in violation of § 14-291.1, his actions constituted "racketeering activity" under the alternate definition established in this section. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Gambling is "racketeering activity" under the North Carolina RICO Act. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

§ 75D-5. RICO civil forfeiture proceedings.

CASE NOTES

Payment of Proceeds from Sale of Forfeited Property. — Since the Racketeer Influenced and Corrupt Organizations Act (RICO) provides that the proceeds from the sale of RICO forfeited property accrue to the State, such proceeds must therefore be paid to the public school fund as required by N.C. Const., Art. IX, § 7. State ex rel. Thornburg v. 532 "B" Street, 334 N.C. 290, 432 S.E.2d 684 (1993).

Evidence. — There was ample evidence to show that defendant's property was used in the course of a racketeering activity where the State's forecast of evidence revealed that each incident of criminal conduct took place on the real property for which forfeiture was sought, where also included in the State's evidence were affidavits of law enforcement officers showing without question that such property was used to further defendant's criminal activity, and where at the hearing before the trial court, the defendant made no effort to rebut or contest the State's evidence. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App.

559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Pattern of Racketeering Activity. — Where the defendant engaged in at least two incidents of racketeering activity that had the same or similar purposes and methods of commission and at least one incident occurred within a four-year period of the other, two of defendant's gambling convictions alone would constitute a "pattern of racketeering activity" under this Act. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Property Used in Furtherance of Unlawful Activity. — Where the evidence adduced at trial clearly showed that defendant engaged in a pattern of racketeering activity and that certain of his property was used in furtherance of such unlawful activity, the defendant's property was subject to forfeiture. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

§ 75D-6. (Effective October 1, 1994 — See editor's note) Power to compel examination.

Whenever the Attorney General has reason to believe that any person or enterprise may have information or may be in possession, custody or control of any documentary materials relevant to an activity prohibited under G.S. 75D-4, he may issue in writing, and cause to be served upon such person or upon the appropriate officers, agents, and employees of any such enterprise (other than one employed as an attorney by such person or enterprise), a notice requiring such person or enterprise to submit themselves to examination by him, and produce for his inspection any documentary material relevant to an investigation of activities prohibited by G.S. 75D-4.

The notice shall be served either personally or by registered or certified mail return receipt requested. The notice shall specify the general purpose of the examination, a general description of the documentary material to be produced, and the time and place where such examination will take place. The witness shall be placed under oath or affirmation to testify truthfully. The examination shall be recorded and the witness has the right to a copy upon payment of its cost. The witness has the right to have legal counsel present during the examination.

The Attorney General shall also have the right to apply to any judge of the superior court division, after five days' prior notice of such application served in the same manner as the notice of examination described in this section, for an order requiring such person or enterprise to appear and subject himself or itself to examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such court.

No such demand or order of a court shall contain any requirement which would be held to be unreasonable if contained in a civil discovery request or court order issued pursuant to G.S. 1A-1, Rules of Civil Procedure 26-36. Any person or enterprise upon whom a demand is served and who objects to complying with such demand in whole or in part, shall, within five days of service of the demand, serve a written reply upon the Attorney General specifying the nature of the objection.

Such examination shall be held in camera and no one, except the person or enterprise being examined, may release information obtained from the examination prior to a proceeding being instituted under this Chapter by the Attorney General. Such information may be used in any proceeding instituted under this Chapter by the Attorney General. Any person violating the provisions of this paragraph shall be guilty of a Class 1 misdemeanor. If such offending person is a public officer or employee, he shall also be dismissed from such office or employment and shall not hold any public office or employment in this State for a period of five years after conviction. This paragraph does not prohibit disclosure of this information to other employees of the Department of Justice, or to district attorneys designated in writing by the Attorney General as authorized to receive this information. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1993, c. 539, s. 569; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and fined not less than two hundred dollars ($200.00) nor more than one thousand dollars ($1,000) or imprisoned, or both" in the third sentence of the fifth paragraph.

§ 75D-7. (Effective October 1, 1994 — See editor's note) False testimony.

False testimony as to any material fact by any person examined under the provisions of this Chapter shall constitute perjury and a conviction shall be punishable as in other cases of perjury as a Class F felony. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1993, c. 539, s. 1286; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class F felony" for "Class 'H' felony".

Chapter 75E.

Unlawful Activities in Connection With Certain Corporate Transactions.

Sec.
75E-1. Definitions.

§ 75E-1. Definitions.

The following words and phrases as used in this Chapter shall have the following meanings unless the context clearly requires otherwise:

(1) "Acquiring person statement" has the same meaning as G.S. 55-9A-02.

(2) "Business combination" has the same meaning as G.S. 55-9-01(b)(1).

(3) "Control share acquisition" has the same meaning as G.S. 55-9A-01(b)(3).

(4) "Person" includes "entity" (as that term is defined in G.S. 55-1-40(9)), "individual" (as that term is defined in G.S. 55-1-40(13)) and, without limiting the generality of the foregoing, "other entity" (as that term is defined in G.S. 55-9-01(b)(6)). (1991, c. 440, s. 1; 1993, c. 553, s. 25.)

Effect of Amendments. — The 1993 amendment, effective July 24, 1993, in subdivision (4) substituted "55-1-40(9))" for "55-1-40(9)."

Chapter 76.

Navigation.

Article 5.

General Provisions.

§ 76-40. (Effective October 1, 1994 — See editor's note) Navigable waters; certain practices regulated.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 76-41. (Effective October 1, 1994 — See editor's note) Obstructing waters of Currituck Sound.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 76-42. (Effective October 1, 1994 — See editor's note) Lumbermen to remove obstructions in Albemarle Sound.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 76-43. (Effective October 1, 1994 — See editor's note) Anchorage in range of lighthouses.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 76-47. (Effective October 1, 1994 — See editor's note) Acting as pilot without license.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 76-57. (Effective October 1, 1994 — See editor's note) Rafts to exercise care in passing buoys, etc., penalty.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 76-58. (Effective October 1, 1994 — See editor's note) Interfering with buoys, beacons, and day marks.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 76A.

Navigation and Pilotage Commissions.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

Article 2.

Pilots.

Sec.
76A-12. Apprentices.
76A-16. (Effective October 1, 1994 — See editor's note) Compulsory use of pilots.

SUBCHAPTER II. MOREHEAD CITY NAVIGATION AND PILOTAGE COMMISSION.

Article 5.

Pilots.

Sec.
76A-46. (Effective October 1, 1994 — See editor's note) Compulsory use of pilots.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

ARTICLE 2.

Pilots.

§ 76A-12. Apprentices.

The Commission when it deems necessary for the best interest of the State is hereby authorized to appoint in its discretion apprentices, none of whom shall be less than 21 years of age, and to make and enforce reasonable rules and regulations relating thereto. Apprentices shall serve for a minimum of one year but no longer than three years in order to be eligible for a limited license. The Commission shall adopt rules and regulations to monitor the progress of apprentices on a regular basis to assure the progressive development of knowledge and skill necessary to obtain a limited license. (1981, c. 910, s. 1; 1987, c. 475.)

Effect of Amendments. — The 1987 amendment, effective June 25, 1987, substituted "none of whom shall be less than 21 years of age" for "none of whom shall be less than 21 nor more than 30 years of age" in the first sentence.

§ 76A-16. (Effective October 1, 1994 — See editor's note) Compulsory use of pilots.

Every foreign vessel and every U.S. vessel sailing under register, including such vessels towing or being towed when underway in the Cape Fear River and Bar and over 60 gross tons, shall employ and take a State-licensed pilot, except when maneuvering during berthing or unberthing operations, shifting within the confine of ports or terminals, passing through bridges, with tug assistance and with a docking master aboard the vessel. Any master of a vessel violating this section shall be guilty of a Class 1 misdemeanor except as provided for in G.S. 76A-18. (1981, c. 910, s. 1; 1993, c. 539, s. 577; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, in the second sentence inserted "Class 1" preceding "misdemeanor" and deleted "upon conviction the master shall be fined, imprisoned, or both within the discretion of the courts".

SUBCHAPTER II. MOREHEAD CITY NAVIGATION AND PILOTAGE COMMISSION.

ARTICLE 5.

Pilots.

§ 76A-46. (Effective October 1, 1994 — See editor's note) Compulsory use of pilots.

Every foreign vessel and every United States vessel sailing under register, including such vessels towing or being towed when underway or docking in the waters of the Morehead City Harbor and Beaufort Bar, either incoming or outgoing, and over 60 gross tons, shall employ and utilize a State licensed pilot. Every foreign vessel sailing including such vessels towing or being towed when underway or docking in the Morehead City to Aurora water route, and over 60 gross tons, shall employ and utilize a State licensed pilot. Any master of a vessel violating this section by failing to use a State licensed pilot shall be guilty of a Class 1 misdemeanor except as provided for in G.S. 76A-54. (1981 (Reg. Sess., 1982), c. 1176, s. 1; 1985, c. 517, s. 3; 1993, c. 539, s. 578; 1994, Ex. Sess., c. 14, s. 45; c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. —

The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, in the third sentence inserted "Class 1" preceding "misdemeanor" and deleted "upon conviction the master shall be fined, imprisoned, or both within the discretion of the courts".

The 1994 Extra Session amendment by c. 14, s. 45, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, deleted the first occurrence of "the" preceding "waters of the Morehead City Harbor."

Chapter 77.

Rivers, Creeks, and Coastal Waters.

Article 5.

High Rock Lake Marine Commission.

Sec.
77-57. Regulatory authority.

ARTICLE 1.

Commissioners for Opening and Clearing Streams.

§ 77-7. (Effective October 1, 1994 — See editor's note) Failure of owner of dam to keep gates, etc.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 2.

Obstructions in Streams.

§ 77-12. (Effective October 1, 1994 — See editor's note) Obstructing passage of boats.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 77-13. (Effective October 1, 1994 — See editor's note) Obstructing streams a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 77-14. (Effective October 1, 1994 — See editor's note) Obstructions in streams and drainage ditches.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

Insurance company could not deny coverage to defendants where they did not intentionally harm their land, and they did not intentionally violate state or county law regarding streams or landfills. Nationwide Mut. Fire Ins. Co. v. Banks, 114 N.C. App. 760, 443 S.E.2d 93 (1994).

ARTICLE 4.

Lake Wylie Marine Commission.

§ 77-37. (See editor's note for date change) Regulations for Lake Wylie and shoreline area.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 5.

High Rock Lake Marine Commission.

§ 77-57. Regulatory authority.

(a) Except as limited in subsection (b) below, by restrictions in any joint ordinance, and by other supervening provisions of law, the Commission may make regulations applicable to High Rock Lake and its shoreline area concerning all matters relating to or affecting the use of High Rock Lake. These regulations may not conflict with or supersede provisions of general or special acts or of regulations of State agencies promulgated under the authority of general law. No regulations adopted under the provisions of this section may be adopted by the Commission except after public hearing, with publication of notice of the hearing in a newspaper of general circulation in the two counties at least 10 days before the hearing. In lieu of or in addition to passing regulations supplementary to State law and regulations concerning the operation of vessels on

High Rock Lake, the Commission may, after public notice, request that the Wildlife Resources Commission pass local regulations on this subject in accordance with the procedure established by appropriate State law.

(b) Violation of any regulation of the Commission commanding or prohibiting an act shall be a Class 3 misdemeanor.

(c) The regulations promulgated under this section take effect upon passage or upon such dates as may be stipulated in the regulations except that no regulation may be enforced unless adequate notice of the regulation has been posted in or on High Rock Lake or its shoreline area. Ordinances providing regulations for specific areas shall clearly establish the boundaries of the affected area by including a map of the regulated area, with the boundaries clearly drawn, or by setting out the boundaries in a written description, or by a combination of these techniques. Adequate notice as to a regulation affecting only a particular location shall be given in the following manner. When an ordinance providing regulations for a specific area is proposed, owners of the parcel of land involved as shown on the county tax listing, and the owners of land within 500 feet of the proposed area to be regulated, as shown on the county tax listing, shall be mailed a notice of the proposed classification by first-class mail at the last addresses listed for such owners on the county tax abstracts. This mailing requirement does not apply in regulations affecting the entire lake. Notice shall also be given by a sign, uniform waterway marker, posted notice, or other effective method of communicating the essential provisions of the regulation in the immediate vicinity of the location in question. Where a regulation applies generally as to High Rock Lake or its shoreline area, or both, there must be a posting of notices, signs, or markers communicating the essential provisions in at least three different places throughout the area, and it shall be printed in a newspaper of general circulation in the two counties.

(d) A copy of each regulation promulgated under this section must be filed by the Commission with the following persons:

(1) The Secretary of State;
(2) The clerks of superior court of Davidson and Rowan Counties;
(3) The Executive Director of the Wildlife Resources Commission; and
(4) The federal Energy Regulatory Commission licensee for High Rock Lake.

(e) Any official designated in subsection (d) above may issue certified copies of regulations filed with the official under the seal of the official's office. Such certified copies may be received in evidence in any proceeding.

(f) Publication and filing of regulations promulgated under this section as required above are for informational purposes and is not a prerequisite to their validity if they in fact have been duly promulgated, the public has been notified as to the substance of the regulations, a copy of the text of all regulations is in fact available to any person who may be affected, and no party to any proceeding has been prejudiced by any defect that may exist with respect to publication and filing. Rules and regulations promulgated by the Commission under the provisions of other sections of this Article relating to internal governance of the Commission need not be filed or published. Where posting of any sign, notice, or marker, or the making of other communication is essential to the validity of a regulation duly promulgated, it is presumed in any proceeding that prior notice was given and maintained and the burden lies upon the party asserting to the contrary to prove lack of adequate notice of any regulation. (1993, c. 355, s. 8; 1993 (Reg. Sess., 1994), c. 767, s. 27.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, substituted "Class 3 misdemeanor" for "misdemeanor punishable by a fine not to exceed two hundred dollars ($200.00) or imprisonment for not more than 30 days" in subsection (b).

Chapter 78A.

Editor's Note. — The legislation and annotations affecting Chapter 78A have been included in a recently published replacement chapter.

Chapter 78B.

Tender Offer Disclosure Act.

Sec.
78B-8. Criminal penalties.

§ 78B-8. Criminal penalties.

(a) Any person who willfully violates this Chapter may be fined not more than five thousand dollars ($5,000) or imprisoned for not more than two years or both. Each of the acts specified herein shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction for any other offense. No indictment or information may be returned under this Chapter more than two years after the alleged violation.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter to the Attorney General or the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime under any other statute. (1977, c. 781, s. 1; 1987, c. 282, s. 10.)

Effect of Amendments. — The 1987 amendment, effective June 4, 1987, substituted "prosecution or conviction for any other offense" for "prosecution of conviction for any other offense" at the end of the second sentence of subsection (a).

Chapter 78C.

Investment Advisers.

Article 4.

Administration and Review.

Sec.
78C-28. Injunctions; cease and desist orders; civil penalties.

Article 5.

Civil Liabilities and Criminal Penalties.

78C-38. Civil liabilities.
Sec.
78C-39. Criminal penalties.

Article 8.

Regulation of Athlete Agents.

78C-78. (See editor's note for date change) Remedies for violation; criminal penalty.

ARTICLE 1.

Title and Definitions.

§ 78C-1. Title.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

ARTICLE 2.

Fraudulent and Prohibited Practices.

§ 78C-8. Advisory activities.

CASE NOTES

There was sufficient evidence to support an indictment for a violation of this section where the State presented evidence showing that defendant advised the victims, for a 10 percent (10%) commission, to invest in the securities of several corporations and that defendant told the victims that the value of these securities would increase by various amounts in the future, promising extravagantly large returns on their original investment. State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

ARTICLE 4.

Administration and Review.

§ 78C-28. Injunctions; cease and desist orders; civil penalties.

(a) Whenever it appears to the Administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may in his discretion bring an action in any court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this Chapter or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. In addition to any other remedies provided by this Chapter, the Administrator may apply to the court hearing this matter for an order of restitution whereby the defendant in such action shall be ordered to make restitution of those sums shown by the Administrator to have been obtained by him in violation of any of the provisions of this Chapter. Such restitution shall be payable, in the discretion of the court, to the Administrator or receiver appointed pursuant to this section for the benefit of those persons whose assets were obtained in violation of this Chapter, or directly to those persons. The court may not require the Administrator to post a bond.

(b)(1) If the Administrator determines after giving notice of an opportunity for a hearing, that any person has engaged in, or is about to engage in, any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may order such person to cease and desist from such unlawful act or practice and take such affirmative action as in the judgment of the Administrator will carry out the purposes of this Chapter.

(2) If the Administrator makes written findings of fact that the public interest will be irreparably harmed by delay in issuing an order under G.S. 78C-28(b)(1), the Administrator may issue a temporary cease and desist order. Upon the entry of a temporary cease and desist order, the Administrator shall promptly notify in writing the person subject to the order that such order has been entered, the reasons therefor, and that within 20 days after the receipt of a written request from such person the matter shall be set down for hearing to determine whether or not the order shall become permanent and final. If no hearing is requested and none is ordered by the Administrator, the order shall remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after giving notice of an opportunity for a hearing to the person subject to the order, shall by written findings of fact and conclusion of law, vacate, modify, or make permanent the order.

(3) No order under subsection (b) of this section, except an order issued pursuant to G.S. 78C-28(b)(2), may be entered without prior notice or an opportunity for hearing. The Administrator may vacate or modify an order under subsection (b) of this section upon his finding that the conditions which required such an order have changed and that it is in the public interest to so vacate or modify.

(4) A final order issued pursuant to the provisions of subsec-

tion (b) of this section shall be subject to review as provided in G.S. 78C-29.

(c) The Administrator may issue an order against an applicant, registered person, or other person who willfully violates this Chapter or a rule or order of the Administrator under this Chapter:

(1) Imposing a civil penalty of up to two thousand five hundred dollars ($2,500) for a single violation or of up to twenty-five thousand dollars ($25,000) for multiple violations in a single proceeding or a series of related proceedings; and

(2) Requiring reimbursement of the costs of investigation.

Any civil penalty or reimbursement imposed under this subsection shall be paid into the General Fund. No order authorized by this subsection may be entered without prior notice of an opportunity for a hearing conducted pursuant to Article 3 of Chapter 150B of the General Statutes. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 7.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, inserted "civil penalties" in the catchline; in subsection (a) added the third and fourth sentences; and added subsection (c).

ARTICLE 5.

Civil Liabilities and Criminal Penalties.

§ 78C-38. Civil liabilities.

(a) Any person who:

(1) Engages in the business of advising others, for compensation, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities, in violation of G.S. 78C-8(b), G.S. 78C-16(a) or (b) (an action pursuant to a violation of G.S. 78C-16(b) may not be maintained except by those persons who directly received advice from the unregistered investment adviser representative), G.S. 78C-10(b), or of any rule or order under G.S. 78C-30(d) which requires the affirmative approval of sales literature before it is used, or

(2) Receives, directly or indirectly, any consideration from another person for advice as to the value of securities or their purchase or sale, whether through the issuance of analyses, reports or otherwise and employs any device, scheme, or artifice to defraud such other person or engages in any act, practice or course of business which operates or would operate as a fraud or deceit on such other person, in violation of G.S. 78C-8(a)(1) or (2),

is liable to any person who is given such advice in such violation, who may sue either at law or in equity to recover (i) the consideration paid for such advice together with interest thereon at the legal rate as provided in G.S. 24-1 from the date of payment of the consideration, plus (ii) the actual damages to such person proximately caused by such violation, plus (iii) costs of the action and reasonable attorneys' fees. An action based on violation of G.S. 78C-8(b) may not prevail where the person accused of the violation sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known of the existence of the facts by reason of which the liability is alleged to exist.

(b) Every person who directly or indirectly controls a person liable under subsection (a) of this section, including every partner, officer, or director of such a person, every person occupying a similar status or performing similar functions, every employee or associate of such a person who materially aids in the conduct giving rise to the liability, and every dealer or salesman who materially aids in such conduct is liable jointly and severally with and to the same extent as such person, unless able to sustain the burden of proof that he did not know, and in the exercise of reasonable care should not have known of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable and as provided among tort-feasors pursuant to Chapter 1B of the General Statutes.

(c) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(d) No person may sue under this section more than three years after the rendering of investment advice in violation of this Chapter, except that in the case of a violation of G.S. 78C-8(a)(1) or (2) a person may sue under this section within two years after such person discovers or should have discovered, the facts constituting the violation.

(e) No person who has made or engaged in the performance of any contract in violation of any provision of this Chapter or any rule or order hereunder, or who has acquired any purported right under such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(f) Any condition, stipulation, or provision binding any person receiving any investment advice to waive compliance with any provision of this Chapter or any rule or order hereunder is void.

(g) The rights and remedies provided by this Chapter are in addition to any other rights or remedies that may exist at law or in equity, but this Chapter does not create any cause of action not specified in this section or G.S. 78C-17(e). (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 8.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, in subsection (b), substituted "in the exercise of reasonable care should not have known" for "did not act in reckless disregard."

§ 78C-39. Criminal penalties.

(a) Any person who willfully violates any provision of this Chapter except G.S. 78C-8(a)(1), 78C-8(a)(2), 78C-8(b), or 78C-9 or who willfully violates G.S. 78C-9 knowing the statement made to be false or misleading in any material respect, shall upon conviction be punished as a Class I felon. Any person who willfully violates G.S. 78C-8(a)(1), 78C-8(a)(2), or 78C-8(b) shall, upon conviction, be punished as a Class H felon.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter or of any rule or order hereunder to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter. Upon receipt of such reference, the district attorney may request that a duly employed attorney of the Administrator prosecute or assist in the prosecution of such violation or violations on behalf of the State. Upon approval of the Administrator, such employee may be appointed a special prosecutor for the district attorney to prosecute or assist in the prosecution of such violations without receiving compensation from the district attorney. Such special prosecutor shall have all the powers and duties prescribed by law for district attorneys and such other powers and duties as are lawfully delegated to such special prosecutor by the district attorney for violations of this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 9.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, near the beginning of subsection (a) inserted "78C-8(a)(1), 78C-8(a)(2), 78C-8(b), or"; added the last sentence of subsection (a); near the beginning of subsection (b), after "rule or order hereunder to" deleted "the Attorney General or"; and added the last three sentences of subsection (b).

ARTICLE 8.

Regulation of Athlete Agents.

§ 78C-78. (See editor's note for date change) Remedies for violation; criminal penalty.

(a) In any civil action brought based upon a violation of G.S. 78C-72(a) or G.S. 78C-76, the relief granted by the court may include the following:

(1) Forfeiture of any right of repayment the athlete agent may otherwise have for anything of value either received by an athlete as an inducement to enter into any agent contract or financial services contract or received by an athlete before completion of the athlete's last high school or intercollegiate contest;

(2) A refund of any consideration paid to the athlete agent on an athlete's behalf; or

(3) Reasonable attorney's fees and court costs incurred by an injured party.

(b) Any agent contract or financial services contract that is negotiated by an athlete agent who has failed to comply with this Article is voidable at the option of the injured party.

(c) **(Effective October 1, 1994 — See editor's note)** An athlete agent commits an offense if the agent knowingly violates G.S. 78C-72(a) or G.S. 78C-76. An offense under this subsection shall be punished as a Class I felony.

(d) The Secretary of State may refer such evidence as is available concerning violations of this Article or of any rule or order hereunder to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Article. Upon receipt of such reference, the district attorney may request that a duly employed attorney of the Secretary of State assist in the prosecution of such violation or violations on behalf of the State.

(e) Nothing in this Article limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law. (1989 (Reg. Sess., 1990), c. 865, s. 1; 1993, c. 539, s. 1288; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class I felony" for "Class J felony" in subsection (c).

Chapter 80.

Trademarks, Brands, etc.

ARTICLE 2.

Timber Marks.

§ 80-20. (Effective October 1, 1994 — See editor's note) Fraudulent use of timber trademark, misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 80-22. (Effective October 1, 1994 — See editor's note) Altering timber trademark crime.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 80-23. (Effective October 1, 1994 — See editor's note) Possession of branded logs without consent, misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 5.

Stamping of Gold and Silver Articles.

§ 80-40. (Effective October 1, 1994 — See editor's note) Marking gold articles regulated.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 80-41. (Effective October 1, 1994 — See editor's note) Marking silver articles regulated.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 80-42. (Effective October 1, 1994 — See editor's note) Marking articles of gold plate regulated.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 80-43. (Effective October 1, 1994 — See editor's note) Marking articles of silver plate regulated.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 80-44. (Effective October 1, 1994 — See editor's note) Violation of Article misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 8.

Registration and Protection of Livestock Brands.

§ 80-66. (Effective October 1, 1994 — See editor's note) Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 81A.

Weights and Measures Act of 1975.

Article 3.

Violations.

§ 81A-29. (Effective October 1, 1994 — See editor's note) Offenses and penalties.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Article 6.

Scale Technician.

§ 81A-80. (See editor's note for date change) Suspension or revocation of registration; penalty.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 83A.

Architects.

Sec.
83A-7. Qualifications and examination requirements.
83A-15. Denial, suspension or revocation of license.
83A-16. (See editor's note for date change) Violations of Chapter; penalties.

§ 83A-1. Definitions.

Cross References. — As to limited liability companies and their powers, see § 57C-2-01 et seq.

Legal Periodicals. —

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

OPINIONS OF ATTORNEY GENERAL

Preparation of Construction Drawings. — A town may not, under its land use ordinance, require that all construction drawings submitted for approval be prepared and sealed by a licensed professional engineer, to the exclusion of licensed professional architects. Such a restriction would be in excess of the powers granted the town. See opinion of Attorney General to Mr. Michael B. Brough, Carrboro Town Attorney, 59 N.C.A.G. 58 (1989).

§ 83A-7. Qualifications and examination requirements.

(a) Licensing by Examination. — Any individual who is at least 18 years of age and of good moral character may make written application for examination by completion of a form prescribed by the Board accompanied by the required application fee. Subject to qualification requirements of this section, the applicant shall be entitled to an examination to determine his qualifications for licensure.

(1) The qualification requirements for registration as a duly licensed architect shall be:
   a. Professional education and at least three years practical training and experience as specified by rules of the Board.
   b. The successful completion of a licensure examination in architecture as specified by the rules of the Board.

(2) The Board shall adopt rules to set requirements for professional education, practical training and experience, and examination which must be met by applicants for licensure and which may be based on the published guidelines of nationally recognized councils or agencies for the accreditation, examination, and licensing for the architectural profession.

(b) Licensing by Reciprocity. — Any individual holding a current license for the practice of architecture from another state or territory, and holding a certificate of qualification issued by the National Council of Architectural Registration Boards, may upon application and within the discretion of the Board be licensed without written examination. The Board may waive the requirement for National Council registration if the qualifications, examination and licensing requirements of the state in which the applicant is licensed are substantially equivalent to those of this State and the applicant otherwise meets the requirements of this Chapter. (1915, c. 270, s. 3; 1919, c. 336, s. 1; C.S., s. 4992; 1957, c. 794, s. 7; 1971, c. 1231, s. 1; 1979, c. 871, s. 1; 1983, c. 47; 1989, c. 62.)

Editor's Note. — Session Laws 1989, c. 62, s. 2, provided: "This act is effective upon ratification [April 19, 1989] and shall apply to applications for licensure submitted on or after that date."

Effect of Amendments. — The 1989 amendment, effective April 19, 1989, in subdivision (a)(1)a, substituted "Professional" for "A degree in architecture from a college or university where the degree program has been approved by the Board, or professional", and deleted "equivalents as specified by rules of the Board" following "education", and in subdivision (a)(2), substituted "education" for "education and equivalents". As to the applicability of this amendment, see the Editor's note.

§ 83A-12. Prohibited practice.

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

OPINIONS OF ATTORNEY GENERAL

Preparation of Construction Drawings. — A town may not, under its land use ordinance, require that all construction drawings submitted for approval be prepared and sealed by a licensed professional engineer, to the exclusion of licensed professional architects. Such a restriction would be in excess of the powers granted the town. See opinion of Attorney General to Mr. Michael B. Brough, Carrboro Town Attorney, 59 N.C.A.G. 58 (1989).

§ 83A-15. Denial, suspension or revocation of license.

(a) The Board shall have the power to suspend or revoke a license or certificate of registration, to deny a license or certificate of registration, or to reprimand or levy a civil penalty not in excess of five hundred dollars ($500.00) per violation against any registrant who is found guilty of:

(1) Dishonest conduct, including but not limited to:

  a. The commission of any fraud, deceit or misrepresentation in any professional relationship with clients or other persons; or with reference to obtaining or maintaining license, or with reference to qualifications, experience and past or present service; or

  b. Using or permitting an individual professional seal to be used by or for others, or otherwise representing registrant as the author of drawings or specifications other than those prepared personally by or under direct supervision of registrant.

(2) Incompetence, including but not limited to:

a. Gross negligence, recklessness, or excessive errors or omissions or building failures in registrant's record of professional practice; or
b. Mental or physical disability or addiction to alcohol or drugs so as to endanger health, safety and interest of the public by impairing skill and care in professional services.

(3) Unprofessional conduct, including but not limited to:
a. Practicing or offering to practice architecture without a current license from this Board;
b. Knowingly aiding or abetting others to evade or violate the provisions of this Chapter, or the health and safety laws of this or other states;
c. Knowingly undertaking any activity or having any significant financial or other interest, or accepting any compensation or reward except from registrant's clients, any of which would reasonably appear to compromise registrant's professional judgment in serving the best interest of clients or public;
d. Willfully violating this Chapter or any rule or standard of conduct published by the Board, or pleading guilty or nolo contendere to a felony or any crime involving moral turpitude.

(b) Actions to recover civil penalties against any registrant may be commenced by the Board pursuant to Chapter 150B of the General Statutes. In determining the amount of any civil penalty, the Board shall consider the degree and extent of harm caused by the violation. Any civil penalty collected hereunder shall be deposited to the General Fund. (1915, c. 270, s. 5; 1919, c. 336, s. 3; C.S., s. 4993; 1953, c. 1041, s. 1; 1957, c. 794, s. 8; 1973, c. 1331, s. 3; 1979, c. 871, s. 1; 1989, c. 81.)

Editor's Note. — The designations of subsections (a) and (b) of this section were assigned by the Revisor of Statutes, the number of subsection (b) in Session Laws 1989, c. 81, having been subdivision (4).

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, and applicable to violations occurring on or after that date, in the introductory language of subsection (a), substituted "registration," for "registration" preceding "or to reprimand", and inserted "or levy a civil penalty not in excess of five hundred dollars ($500.00) per violation against", and added subsection (b).

§ 83A-16. (See editor's note for date change) Violations of Chapter; penalties.

(a) **(Effective October 1, 1994 — See editor's note)** Any individual or corporation not registered under this Chapter, who shall wrongfully use the title "Architect" or represent himself or herself to the public as an architect, or practice architecture as herein defined, or seek to avoid the provisions of this Chapter by the use of any other designation than "Architect": (i) shall be guilty of a Class 2 misdemeanor ; and (ii) be subject to a civil penalty not to exceed five hundred dollars ($500.00) per day of such violation. Each day of such unlawful practice shall constitute a distinct and separate violation. Any civil penalty collected hereunder shall be deposited to the General Fund.

(b) Actions and prosecutions under this section shall be commenced in the county in which the defendant resides, or has his principal place of business, or in the case of an out-of-state corporation, is conducting business.

(c) Actions to recover civil penalties shall be initiated by the Attorney General. (1915, c. 270, s. 4; C.S., s. 4996; 1941, c. 369, ss. 1, 2; 1951, c. 1130, s. 3; 1957, c. 794, s. 11; 1965, c. 1100; 1969, c. 718, s. 21; 1973, c. 1414, s. 1; 1979, c. 871, s. 1; 1993, c. 539, s. 595; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor and shall upon conviction be sentenced to pay a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or suffer imprisonment for a period not exceeding three months or both such fine and imprisonment" in clause (i) of the first sentence of subsection (a).

Chapter 84.

Attorneys-at-Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

Sec.
84-2. (Effective October 1, 1994 — See editor's note) Persons disqualified.
84-4.1. Limited practice of out-of-state attorneys.
84-8. (Effective October 1, 1994 — See editor's note) Punishment for violations; legal clinics of law schools excepted.
84-10. (Effective October 1, 1994 — See editor's note) Violation of § 84-9 a misdemeanor.

Article 4.

North Carolina State Bar.

84-17. Government.

Sec.
84-18. Terms, election and appointment of councilors.
84-19. Judicial districts definition.
84-21. Organization of council; publication of rules, regulations and bylaws.
84-23.1. Prepaid legal services.
84-24. Admission to practice.
84-28. Discipline and disbarment.
84-34. Membership fees and list of members.
84-34.1. Deposits of the North Carolina State Bar.
84-38. (Effective October 1, 1994 — See editor's note) Solicitation of retainer or contract for legal services prohibited; division of fees.

ARTICLE 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-1. Oaths taken in open court.

Cross References. — As to limited liability companies and their powers, see § 57C-2-01 et seq.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 84-2. (Effective October 1, 1994 — See editor's note) Persons disqualified.

No justice, judge, full-time district attorney, full-time assistant district attorney, public defender, assistant public defender, clerk, deputy or assistant clerk of the General Court of Justice, nor register of deeds, nor sheriff, shall engage in the private practice of law. Persons violating this provision shall be guilty of a Class 3 misdemeanor and only fined not less than two hundred dollars ($200.00). (C.C.P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C.S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1965, c. 418, s. 1; 1969, c. 44, s. 59; 1973, c. 47, s. 2; c. 108, s. 36; 1981, c. 788, s. 1; 1993, c. 539, s. 596; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 3" preceding "misdemeanor" and inserted "only" preceding "fined not less than".

§ 84-2.1. "Practice law" defined.

Legal Periodicals. —

For note on the unauthorized practice of law by corporations, see 65 N.C.L. Rev. 1422 (1987).

CASE NOTES

Section Not Exhaustive. — The last sentence in this section makes it clear that the statute does encompass all the activities that could be considered the practice of law. Toms v. Lawyers Mut. Liab. Ins. Co., 104 N.C. App. 88, 408 S.E.2d 206 (1991), cert. denied, 330 N.C. 618, 412 S.E.2d 95 (1992).

The key as to whether attorney performed a professional service was not the act, but rather, the capacity in which he undertook the performance of the act. Toms v. Lawyers Mut. Liab. Ins. Co., 104 N.C. App. 88, 408 S.E.2d 206 (1991), cert. denied, 330 N.C. 618, 412 S.E.2d 95 (1992).

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

Law Firm's Liability for Activities of Partner. — In order to determine whether members of a law firm should be held liable for the activities of one of its partners, the court should consider (1) the provisions of the instrument empowering the firm to practice law, such as partnership agreements and articles of incorporation, as well as statutory provisions; (2) the construction which our courts have historically given the questioned activity or related ones; (3) where the partner has acted, or seemed to act, with the firm's authority; this includes his position in the firm, the participation — if any — by the rest of the firm in the disputed activities, and any assurances given the client that this transaction would be handled through the firm; and finally, (4) whether the other members of the firm have assented to or ratified the acts. Shelton v. Fairley, 86 N.C. App. 147, 356 S.E.2d 917, cert. denied, 320 N.C. 634, 360 S.E.2d 94 (1987).

§ 84-4. Persons other than members of State Bar prohibited from practicing law.

Legal Periodicals. —

For note on the unauthorized practice of law by corporations, see 65 N.C.L. Rev. 1422 (1987).

§ 84-4.1. Limited practice of out-of-state attorneys.

Any attorney domiciled in another state, and regularly admitted to practice in the courts of record of that state and in good standing therein, having been retained as attorney for a party to any civil or criminal legal proceeding pending in the General Court of Justice of North Carolina, or the North Carolina Utilities Commission or the North Carolina Industrial Commission or the Office of Administrative Hearings of North Carolina may, on motion, be admitted to practice in the General Court of Justice or the North Carolina Utilities Commission or the North Carolina Industrial Commission or the Office of Administrative Hearings of North Carolina for the sole purpose of appearing for a client in the litigation. The motion required under this section shall contain or be accompanied by:

(1) The attorney's full name, post-office address and status as a practicing attorney in another state.

(2) A statement, signed by the client, setting forth the client's address and declaring that the client has retained the attorney to represent the client in the proceeding.

(3) A statement that unless permitted to withdraw sooner by order of the court, the attorney will continue to represent the client in the proceeding until the final determination thereof, and that with reference to all matters incident to the proceeding, the attorney agrees to be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if the attorney were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

(4) A statement that the state in which the attorney is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.

(5) A statement to the effect that the attorney has associated and is personally appearing in the proceeding, with an attorney who is a resident of this State and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with such legal proceedings, or any disciplinary matter, with the same effect as if personally made on the foreign attorney within this State.

Compliance with the foregoing requirements does not deprive the court of the discretionary power to allow or reject the application. (1967, c. 1199, s. 1; 1971, c. 550, s. 1; 1975, c. 582, ss. 1, 2; 1977, c. 430; 1985 (Reg. Sess., 1986), c. 1022, s. 8; 1991, c. 210, s. 2.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, inserted "or the Office of Administrative Hearings of North Carolina" following "or the North Carolina Industrial Commission" in the introductory paragraph.

The 1991 amendment, effective October 1, 1991, rewrote this section.

CASE NOTES

Substantial Right to Representation By Attorney Properly Admitted Under Section. — Plaintiff had a substantial right to have attorney of her choice, who had been properly admitted pro hac vice under this section represent her in her lawsuit, and order removing him as counsel affected a substantial right of the plaintiff and was immediately appealable. Goldston v. AMC, 326 N.C. 723, 392 S.E.2d 735 (1990).

§ 84-5. Prohibition as to practice of law by corporation.

Legal Periodicals. — For note on the unauthorized practice of law by corporations, see 65 N.C.L. Rev. 1422 (1987).

CASE NOTES

Purpose. — The main purpose of this section is to prohibit corporations from performing legal services for others. Duke Power Co. v. Daniels, 86 N.C. App. 469, 358 S.E.2d 87 (1987).

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

Signing of Complaint by Employee Was Not Unauthorized Practice of Law. — Electric utility company, by having its lay employee sign a complaint in a small claim action to collect an unpaid power bill, did not practice law in violation of the provisions of this section. Duke Power Co. v. Daniels, 86 N.C. App. 469, 358 S.E.2d 87 (1987).

§ 84-8. (Effective October 1, 1994 — See editor's note) Punishment for violations; legal clinics of law schools excepted.

Any person, corporation, or association of persons violating the provisions of G.S. 84-4 to 84-8 shall be guilty of a Class 1 misdemeanor. Provided, that G.S. 84-4 to 84-8 shall not apply to any law school or law schools conducting a legal clinic and receiving as their clientage only those persons unable financially to compensate for legal advice or services rendered. (1931, c. 157, s. 5; c. 347; 1993, c. 539, s. 597; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and punished by a fine or imprisonment, or both, in the discretion of the court."

§ 84-10. (Effective October 1, 1994 — See editor's note) Violation of § 84-9 a misdemeanor.

Any individual, corporation, or firm or other association of persons violating any provision of G.S. 84-9 shall be guilty of a Class 1 misdemeanor. (1931, c. 208, s. 3; 1993, c. 539, s. 598; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor."

ARTICLE 2.

Relation to Client.

§ 84-11. Authority filed or produced if requested.

Legal Periodicals. — For essay, "Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy," see 65 N.C.L. Rev. 315 (1987).

§ 84-13. Fraudulent practice, attorney liable in double damages.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

CASE NOTES

Section Not Limited to Actual Fraud Cases. — This section does not limit its applicability to cases of actual fraud. Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816 (1990).

Presumption of Fraud. — When an attorney mishandles client funds, there is a presumption of fraud as a matter of law, and this section applies. Ehlenbeck v. Patton, 58 Bankr. 149 (W.D.N.C. 1986).

In a bankruptcy proceeding in which client of bankrupt attorney filed a proof of claim relating to attorney's embezzlement of money delivered to him in trust, the bankruptcy judge did not err in finding client's actual damages, then doubling the damages pursuant to this section, and finding the entire amount nondischargeable. Ehlenbeck v. Patton, 58 Bankr. 149 (W.D.N.C. 1986).

Cited in Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992).

ARTICLE 3.

Arguments.

§ 84-14. Court's control of argument.

Legal Periodicals. — For article, "Rummaging Through a Wilderness of Verbiage: The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

I. General Consideration.
II. Scope of Argument.
  A. In General.
IV. Number of Arguments.
V. Capital Cases.
VI. Objection.
  A. In General.
VII. Opening and Closing Arguments.

I. GENERAL CONSIDERATION.

Discretion of Court. —

In accord with second paragraph in the main volume. See State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

A trial judge's violation of the provisions of this section is prejudicial error. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Applied in State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994).

Cited in State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986); State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Barber, 93 N.C. App. 42, 376 S.E.2d 497 (1989); In re Golia-Paladin, 327 N.C. 132, 393 S.E.2d 799 (1990); State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (1994).

II. SCOPE OF ARGUMENT.

A. In General.

Counsel May Argue Both Law and Fact. —

The right to argue "the whole case as well of law as of fact" to the jury arises regardless of whether the trial court's jury instructions will also relate the law on the issue. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Reading and Commenting on Reported Cases. —

This section grants counsel the right to argue the law to the jury, which includes the authority to read and comment on reported cases and statutes. There are, however, limitations on what portions of these cases counsel may relate. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Counsel may only read statements of the law in the case which are relevant to the issues before the jury. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Reading Facts in Reported Cases. — Counsel may not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Reading Excerpts from Treatises in Reported Cases. — It would be an improper interpretation of this section to allow counsel to avoid the rule prohibiting counsel from reading from medical books or writings of a scientific nature to the jury except when an expert has given an opinion and cited a treatise as his authority on the basis that he read the material from an appellate reporter rather than from the magazine or book itself, especially where it was contained in an opinion that had been reversed by the Supreme Court. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Counsel May Not Read Mere Dictum or Irrelevant Decisions. — Although counsel may properly read statements of law and their attendant facts found in the original opinion to the jury, counsel may not read matters which are not law but rather constitute mere dictum and therefore are not within the scope of this section, nor may counsel read to the jury decisions discussing principles of law which are irrelevant to the case and have no application to the facts in evidence. State v. Austin, 320 N.C. 276, 357 S.E.2d 641, cert. denied, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987).

Reading Dissenting Opinion, etc.

Counsel may not read from a dissenting opinion in a reported case. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

When Case Law Desired to Be Read Is Excluded. — Defendant bears the burden of proving that the erroneous exclusion of case law which defense counsel sought to read to the jury was prejudicial. State v. Harrison, 90 N.C. App. 629, 369 S.E.2d 624 (1988), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 353 (1993).

Case Law Improperly Excluded at Trial. — Where the statement of law read to the jury by defense counsel specifically addressed the State's use of circumstantial evidence to obtain a conviction, had not been reversed on appeal, and was relevant to the issue of circumstantial evidence before the jury in the present case, the trial court improperly excluded the case law at trial. State v. Harrison, 90 N.C. App. 629, 369 S.E.2d 624 (1988), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 353 (1993).

Consequences of Nonunanimity. — Defense counsel is not entitled to argue that trial court will impose a life sentence if the jury cannot reach a unanimous decision; therefore, the trial court properly refused to permit counsel to argue the consequences of nonunanimity. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Laws, 328 N.C. 550, 402 S.E.2d 573.

Prohibiting the Reading of the Fifth Amendment Held Not Reversible Error. — The trial court did not commit reversible error in prohibiting the reading to the jury of that portion of the Fifth Amendment pertinent to the defendant's election not to testify, where in his general instructions to the jury, the judge gave an accurate and complete statement of the law applicable to defendant's election not to testify. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Defense counsel was entitled to read to the jury that clause of the Fifth Amendment material to defendant's election not to testify, i.e., "No person ... shall be compelled in any criminal case to be a witness against himself" and to say simply that because of this provision, the jury must not consider defendant's election not to testify adversely to him, or words to this effect. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

IV. NUMBER OF ARGUMENTS.

In trials in the superior courts involving other than capital felonies, the State and the defendant are entitled to two addresses to the jury. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

The trial court's refusal to permit both counsels to address the jury during defendant's final arguments constituted prejudicial error per se in both the guilt-innocence and sentencing phases. State v. Campbell, 332 N.C. 116, 418 S.E.2d 476 (1992).

In a capital case as many as three counsel on each side may argue for as long as they wish, and each may address the jury as many times as he desires. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

When, in a capital case, a defendant does not offer evidence and is entitled to both open and close the argument to the jury, his attorneys may each address the jury as many times as they desire during the closing phase of the argument. The only limit to this right is the provision of this section allowing the trial judge to limit to three the number of counsel on each side who may address the jury. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

V. CAPITAL CASES.

This section places two restraints on a trial court's ability to limit jury arguments in capital felonies. First, the statute prohibits the trial court from limiting the number of addresses which can be made to the jury. Second, although the court may limit the number of attorneys who may address the jury to not less than three on each side, the statute prevents the trial court from imposing a limit on the length of the arguments. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Reference to Parole Statute. — Where the word "parole" was never used, and there was no specific mention of the possibility that a life sentence could mean release in 20 years, the district attorney's arguments did not suggest the possibility of parole in so direct a manner as to amount to a gross impropriety requiring ex mero motu intervention by the trial court. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Final Closing Argument Where Defendant Presents Evidence. — This section means that although the trial court in a capital case may limit to three the number of counsel on each side who may address the jury, those three (or however many actually argue) may argue for as long as they wish, and each may address the jury as many times as he desires. However, if defendant presents evidence, all such addresses must be made prior to the prosecution's closing argument. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Where defendant in a capital case presented evidence, the State had the right to give the final closing argument pursuant to Rule 10 of the General Rules of Practice for the Superior and District Courts. This section did not give defendant the right to respond to the State's argument. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Quotations from the Bible. — District attorney's closing remarks at the penalty phase, in which he read quotations from the Bible, were not so improper as to require intervention by the trial court ex mero motu. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Evidence supported district attorney's reference to defendant as a "professional assassin" in attorney's argument at the guilt phase, and defendant failed to object to the statement; therefore, the trial court did not err in failing to intervene ex mero motu to correct this remark. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Refusal to Allow Both Defense Counsel to Argue Was Prejudicial Error. — At the conclusion of the sentencing proceeding in capital murder case, the trial court erred in refusing to permit both counsel for defendant to address the jury during defendant's final argument. This deprived the defendant of a substantial right and amounted to prejudicial error. State v. Simpson, 320 N.C. 313, 357 S.E.2d 332 (1987), cert. denied, 485 U.S. 963, 108 S. Ct. 1230, 99 L. Ed. 2d 430 (1988).

Trial court's refusal in a capital case to permit both counsel to address the jury during defendant's final arguments constituted prejudicial error per se in both the guilt-innocence and sentencing phases, entitling defendant to a new trial. State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988).

How Often and How Long Defense Attorneys May Address Jury. — In capital cases this section allows the trial court to limit defendant to three counsel, but at each point at which defendant has the right to present an argument to the jury those three, or however many actually argue, may argue for as long as they wish, and each may address the jury as many times as he desires. Thus, for example, if one defense attorney grows weary of arguing, he may allow another defense attorney to address the jury, and may, upon being refreshed, rise again to make another address during defendant's time for argument. State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988).

When a defendant is entitled to the final or last jury argument, during the closing arguments in a capital case, his attorneys may each address the jury as many times as they desire during the closing phase of the arguments. The only limit to this right is the provision of this section allowing the trial judge to limit to three the number of counsel on each side who may address the jury. State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988).

In cases in which a capital felony has been joined for trial with noncapital charges, the failure of the trial judge to allow both of defendant's counsel to make the closing argument is prejudicial error in the noncapital as well as the capital charges. State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988).

VI. OBJECTION.

A. In General.

Duty of Court, etc. —

In accord with second paragraph in the main volume. See State v. Ford, 323 N.C. 466, 373 S.E.2d 420 (1988).

VII. OPENING AND CLOSING ARGUMENTS.

The right to closing argument is a substantial legal right of which a defendant may not be deprived by the exercise of a judge's discretion. State v.

Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

If, in a non-capital case, defendant elects to present evidence, he is entitled to open the argument to the jury before the prosecution argues, and two of his counsel may address the jury within the time limits prescribed by this section. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

If defendant in a non-capital case does not present evidence, he is entitled to both open and close the argument to the jury. In such case he may have one lawyer make the opening argument and one the closing, or he may waive one argument and have both lawyers address the jury during the remaining argument. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Where defendant by stipulation waived her opening argument, the failure of the trial judge to allow both of defendant's counsel to make the closing argument was prejudicial error in the non-capital as well as the capital charges against her. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

ARTICLE 4.

North Carolina State Bar.

§ 84-15. Creation of North Carolina State Bar as an agency of the State.

CASE NOTES

Effect of Proceedings Before State Bar. — Where the status of plaintiff's license as an attorney was at issue and was finally adjudicated in proceedings before the State Bar and the Bar Council, and plaintiff did not appeal the Bar's order of disbarment, that judgment was conclusive as to those matters which were at issue and determined in those proceedings, and plaintiff could not relitigate the identical issue considered and finally determined in the proceedings before the State Bar. Vann v. North Carolina State Bar, 79 N.C. App. 166, 339 S.E.2d 95 (1986).

§ 84-17. Government.

The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar hereinafter referred to as the "council", which shall be composed of 50 councilors exclusive of officers, except as hereinafter provided, to be appointed or elected as hereinafter set forth, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president, whose term of office expires at the 1973 annual meeting or after. Notwithstanding any other provisions of the law, the North Carolina State Bar shall have the power and authority to acquire, hold, rent, encumber, alienate, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The North Carolina State Bar Council is authorized and empowered in its discretion to utilize the services of the Purchase and Contract Division of the Department of Administration for the procurement of personal property, in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes. Notwithstanding any provisions of this Article as to the voting powers of members, the council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in G.S. 84-33 provided. There shall be one councilor from each judicial district and additional councilors as are necessary to make the total number of councilors 50. The additional councilors shall be allocated and reallocated by the North Carolina State Bar every six years on the basis of the number of the active members of each judicial district bar according to the records of the North Carolina State Bar and in accordance with a formula to be adopted by the North Carolina State Bar, to insure an allocation based on lawyer population of each judicial district bar as it relates to the total number of active members of the State Bar.

A councilor whose seat has been eliminated due to a reallocation shall continue to serve on the council until expiration of the remainder of the current term.

In addition to the 50 councilors, there shall be three public members not licensed to practice law in this or any other state who shall be appointed by the Governor. (1933, c. 210, s. 3; 1937, c. 51, s. 1; 1955, c. 651, s. 1; 1961, c. 641; 1973, c. 1152, s. 2; 1977, c. 841, s. 2; 1979, c. 570, ss. 1, 2; 1981, c. 788, s. 3; 1985, c. 60, s. 1; 1987, c. 316, s. 1.)

Effect of Amendments. —

The 1987 amendment, effective June 8, 1987, deleted the former first sentence of the second paragraph, which read "In the event a judicial district is divided after any allocation as hereinafter provided, then the total number of councilors shall be increased until the next allocation, so as to provide one councilor for each such district, unless the district has one or more councilors who are members of such judicial district."

Legal Periodicals. — For article on the criminal defendant who proposes or commits perjury, see 17 N.C. Cent. L.J. 157 (1988).

§ 84-18. Terms, election and appointment of councilors.

(a) Except as set out in this section, the terms of councilors are fixed at three years commencing on the first day of January in the year following their election. A year shall be the calendar year. No councilor may serve more than three successive three-year terms but a councilor may serve an unlimited number of three successive three-year terms provided a three-year period of nonservice intervenes in each instance. This paragraph shall not apply to officers of the State Bar.

All councilors serving at the effective date of these changes shall remain in office and continue to represent their district for the remainder of their term. Those who have already served for 18 months or more shall be eligible for election to two additional three-year terms and be ineligible for election thereafter until a period of three years has expired. Those who have served less than 18 months shall be eligible for election to three consecutive three-year terms and be ineligible for election thereafter until an intervening three-year period has expired.

When a judicial district loses a councilor or is entitled to an additional councilor by virtue of reallocation of councilors as provided in

G.S. 84-17 above, then the affected judicial districts shall certify to the State Bar Council the identity of that judicial district's authorized councilor or councilors. This certification shall be made within 90 days of the date the reallocation is made and reported to the judicial districts affected. Until this certification is received, the district shall have no representation on the State Bar Council. In the case of reallocation, the certification shall be made within 90 days.

Any North Carolina State Bar member, other than an inactive member, is eligible to serve as a councilor from the judicial district in which he or she is eligible to vote.

(b) The State Bar Council may promulgate rules to govern the election and appointment of councilors. The election and appointment of councilors shall be as follows:

Each judicial district bar shall elect one eligible North Carolina State Bar member for each State Bar Council vacancy in the district. Any vacancy occurring after the election, whether caused by resignation, death or otherwise shall be filled by the judicial district bar in which the vacancy occurs. The appointment shall be for the unexpired portion of the term and shall be certified to the State Bar Council by the judicial district bar. Any appointed councilor shall be subject to the terms set forth in subsection (a) of G.S. 84-18.

(c) Public members shall serve three-year terms. No public member shall serve more than two complete consecutive terms. (1933, c. 210, s. 4; 1953, c. 1310, s. 1; 1979, c. 570, s. 3; 1981, c. 788, s. 4; 1985, c. 60, ss. 2, 3; 1987, c. 316, s. 2.)

Effect of Amendments. —

The 1987 amendment, effective June 8, 1987, deleted "or is entitled to a councilor by virtue of the creation of a new district" following "as provided in G.S. 84-17 above," in the first sentence of the third paragraph of subsection (a).

§ 84-19. Judicial districts definition.

For purposes of this Article, the term "judicial district" means a judicial district as in existence on January 1, 1987, and the term "district bar" means the bar of a judicial district as defined by this section. (1933, c. 210, s. 5; 1955, c. 651, s. 2; 1979, c. 570, s. 4; 1987, c. 316, s. 3.)

Effect of Amendments. — The 1987 amendment, effective June 8, 1987, rewrote this section, which formerly related to the change of judicial districts.

§ 84-21. Organization of council; publication of rules, regulations and bylaws.

Upon receiving notification of the election of a councilor for each judicial district, or, if such notification shall not have been received from all said districts, within 120 days after this Article shall have gone into effect, the clerk of the Supreme Court of North Carolina shall call a meeting of the councilors of whose election he shall have been notified, to be held in the City of Raleigh not less than 20 days nor more than 30 days after the date of said call; and at the meeting so held the councilors attending the same shall proceed to organize the council by electing officers, taking appropriate steps toward the adoption of rules and regulations, electing councilors for judicial districts which have failed to elect them, and taking such other action as they may deem to be in furtherance of this Article. The regular term of all officers shall be one year, but those first elected shall serve until January 1, 1935. The council shall be the judge of the election and qualifications of its own members. When the council shall have been fully organized and shall have adopted such rules, regulations and bylaws, not inconsistent with this Article, as it shall deem necessary or expedient for the discharge of its duties, the secretary-treasurer shall file with the clerk of the Supreme Court of North Carolina a certificate, to be called the "certificate of organization," showing the officers and members of the council, with the judicial districts which the members respectively represent, and their post-office addresses, and the rules, regulations and bylaws adopted by it; and thereupon the Chief Justice of the Supreme Court of North Carolina, or any judge thereof, if the court be then in vacation, shall examine the said certificate and, if of opinion that the requirements of this Article have been complied with, shall cause the said certificate to be spread upon the minutes of the court; but if of opinion that the requirements of this Article have not been complied with, shall return the said certificate to the secretary-treasurer with a statement showing in what respects the provisions of this Article have not been complied with; and the said certificate shall not be again presented to the Chief Justice of the Supreme Court or any judge thereof, until any such defects in the organization of the council shall have been corrected, at which time a new certificate of organization shall be presented and the same course taken as hereinabove provided, and so on until a correct certificate showing the proper organization of the council shall have been presented, and the organization of the council accordingly completed. Upon (a) the entry of an order upon the minutes of the court that the requirements of this Article have been complied with, or (b) if for any reason the Chief Justice or judge should not act thereon within 30 days, then, after the lapse of 30 days from the presentation to the Chief Justice or judge, as the case may be, of any certificate of organization hereinbefore required to be presented by the secretary-treasurer, without either the entry of an order or the return of said certificate with a statement showing the respects in which this Article has not been complied with, the organization of the council shall be deemed to be complete, and it shall be vested with the powers herein set forth; and the certificate of organization shall thereupon forthwith be spread upon the minutes of the court. A copy of the certificate of organization, as spread upon the minutes of the court, shall be published in the next ensuing volume of the North Carolina Reports and in the North Carolina Administrative Code. The rules and regulations set forth in the certificate of organization, and all other rules and regulations which may be adopted by the council under this Article, may be amended by the council from time to time in any manner not inconsistent with this Article. Copies of all such rules and regulations adopted subsequently to the filing of the certificate of organization, and of all amendments so made by the council, shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by it upon its minutes, and published in the next ensuing number of the North Carolina Reports and in the North Carolina Administrative Code: Provided, that the court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article. (1933, c. 210, s. 7; 1991, c. 418, s. 7.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, inserted "and in the North Carolina Administrative Code" in two places.

Legal Periodicals. — For article on the criminal defendant who proposes or commits perjury, see 17 N.C. Cent. L.J. 157 (1988).

§ 84-23. Powers of council.

Legal Periodicals. — For article on the criminal defendant who proposes or commits perjury, see 17 N.C. Cent. L.J. 157 (1988).

CASE NOTES

Error in Dismissing Grievance Filed with State Bar. — North Carolina State Bar and the trial courts of this State share concurrent jurisdiction over matters of attorney discipline; therefore, where individual filed a civil claim against attorney for alleged impropriety in handling an estate, and also filed a grievance with the State Bar alleging that the attorney's actions violated the Rules of Professional Conduct, the trial court erred in naming the State Bar as a party and dismissing the grievance proceeding against the defendant. North Carolina State Bar v. Randolph, 325 N.C. 699, 386 S.E.2d 185 (1989).

§ 84-23.1. Prepaid legal services.

(a) This section is in addition to and not a limitation of the powers and responsibilities of the council set out in G.S. 84-23. To the extent that this section deals with the same powers and responsibilities it shall be taken to be in amplification of those powers and not in derogation thereof.

(b) Repealed by Session Laws 1991, c. 210, s. 1, effective October 1, 1991.

(b1) All organizations offering prepaid legal services plans shall register those plans with the North Carolina State Bar Council on forms provided by the Council. Each plan shall be registered prior to its implementation or operation in this State.

(c) Repealed by Session Laws 1991, c. 210, s. 1, effective October 1, 1991.

(d) Notwithstanding registration of the plan with the North Carolina State Bar Council pursuant to subsection (b1), any plan for prepaid legal services is subject to regulation under Chapter 58 of the General Statutes if offered by a company engaged in the insurance business or if the plan itself constitutes the offering of insurance.

(e) Repealed by Session Laws 1991, c. 210, s. 1, effective October 1, 1991. (1975, c. 707, s. 1; 1991, c. 210, s. 1.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, repealed former subsection (b), relating to the responsibility and authority of the council to approve of prepaid legal services plans; added subsection (b1); repealed former subsection (c), relating to the authority of the council to create a nonprofit corporation for providing prepayment for legal services and enumerating the powers of that corporation; in subsection (d), substituted the language beginning "registration" and ending "subsection (b1)" for "approval of the council pursuant to subsection (b)," deleted "other than pursuant to subsection (c)" following "prepaid legal services," and deleted "Articles 1 through 64 of" preceding "Chapter 58"; and repealed former subsection (e), prohibiting plans for prepaid legal services from restricting or denying a person receiving prepaid legal services the right to select an attorney of his choice.

§ 84-24. Admission to practice.

The provisions of the law now obtaining with reference to admission to the practice of law, as amended, and the rules and regulations prescribed by the Supreme Court of North Carolina with reference thereto, shall continue in force until superseded, changed or modified by or under the provisions of this Article.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of 11 members of the Bar, elected by the council of the North Carolina State Bar, who need not be members of the council. No teacher in any law school, however, shall be eligible. The members of the Board of Law Examiners elected from the Bar shall each hold office for a term of three years: Provided, that the members first elected shall hold office, two for one year, two for two years, and two for three years.

The Board of Law Examiners shall elect a member of said Board as chairman thereof, and the Board may employ an executive secretary and provide such assistance as may be required to enable said Board to perform its duties promptly and properly. The chairman and any employees shall serve for such period as said Board may determine.

The examination shall be held in such manner and at such times as the Board of Law Examiners may determine.

The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law and to this end the Board of Law Examiners shall have the power of subpoena and to summons and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the inquiry and shall also have authority to employ and provide such assistance as may be required to enable it to perform its duties promptly and properly. Records, papers, and other documents containing information collected and compiled by the Board or its members or employees as a result of investigations, inquiries, or interviews conducted in connection with examinations or licensing matters, are not public records within the meaning of Chapter 132 of the General Statutes.

All applicants for admission to the Bar shall be fingerprinted to determine whether the applicant has a record of criminal conviction in this State or in any other state or jurisdiction. The information obtained as a result of the fingerprinting of an applicant shall be limited to the official use of the Board of Law Examiners in determining the character and general fitness of the applicant.

The Board of Law Examiners, subject to the approval of the council shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession:

Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of such change.

All such rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in G.S. 84-21 in relation to the certificate of organization and the rules and regulations of the council.

Whenever the council shall order the restoration of license to any person as authorized by G.S. 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to such person, noting thereon that the same is issued in compliance with an order of the council of the North Carolina State Bar, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance.

Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G.S. 84-21 or as may be promulgated by the Supreme Court. (1933, c. 210, s. 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, s. 6; 1947, c. 77; 1951, c. 991, s. 1; 1953, c. 1012; 1965, cc. 65, 725; 1973, c. 13; 1977, c. 841, s. 2; 1983, c. 177; 1991, c. 210, s. 4.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, added the second sentence of the fifth paragraph.

§ 84-28. Discipline and disbarment.

(a) Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the council of the North Carolina State Bar under such rules and procedures as the council shall promulgate as provided in G.S. 84-21.

(b) The following acts or omissions by a member of the North Carolina State Bar or any attorney admitted for limited practice under G.S. 84-4.1, individually or in concert with any other person or persons, shall constitute misconduct and shall be grounds for discipline whether the act or omission occurred in the course of an attorney-client relationship or otherwise:

(1) Conviction of, or a tender and acceptance of a plea of guilty or no contest to, a criminal offense showing professional unfitness;

(2) The violation of the Rules of Professional Conduct adopted and promulgated by the council of the North Carolina State Bar in effect at the time of the act;

(3) Knowing misrepresentation of any facts or circumstances surrounding any complaint, allegation or charge of misconduct; failure to answer any formal inquiry or complaint issued by or in the name of the North Carolina State Bar in any disciplinary matter; or contempt of the council or any committee of the North Carolina State Bar.

(c) Misconduct by any attorney shall be grounds for:

(1) Disbarment; or

(2) Suspension for a period up to but not exceeding five years, any portion of which may be stayed upon reasonable conditions to which the offending attorney consents; or

(3) Censure — A censure is a written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of

Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession or members of the public, but the protection of the public does not require suspension of the attorney's license; or

(4) Reprimand — A reprimand is a written form of discipline more serious than an admonition issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct, but the protection of the public does not require a censure. A reprimand is generally reserved for cases in which the attorney's conduct has caused harm or potential harm to a client, the administration of justice, the profession, or members of the public; or

(5) Admonition — An admonition is a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.

Any order disbarring or suspending an attorney may impose reasonable conditions precedent to reinstatement. Any order of the Disciplinary Hearing Commission or the Grievance Committee imposing a censure, reprimand, or admonition may also require the attorney to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court.

(d) Any attorney admitted to practice law in this State, who is convicted of or has tendered and has had accepted, a plea of guilty or no contest to, a criminal offense showing professional unfitness, may be suspended from the practice of law, but this suspension shall not take place pending appeal of the conviction.

(e) Any attorney admitted to practice law in this State who is disciplined in another jurisdiction shall be subject to the same discipline in this State: Provided, that the discipline imposed in the other jurisdiction does not exceed that provided for in subsection (c) above and that the attorney was not deprived of due process in the other jurisdiction.

(f) Upon application by the North Carolina State Bar, misconduct by an attorney admitted to practice in this State may be restrained or enjoined where the necessity for prompt action exists regardless of whether a disciplinary proceeding in the matter of such conduct is pending. Such application shall be filed in the Superior Court of Wake County and shall be governed by the procedure set forth in G.S. 1A-1, Rule 65.

(g) Any member of the North Carolina State Bar may be transferred to disability inactive status for mental incompetence or physical disability interfering with the attorney's ability to competently engage in the practice of law under such rules and procedures as the council shall promulgate as provided in G.S. 84-21.

(h) There shall be an appeal of right from any final order imposing admonition, reprimand, censure, suspension or disbarment upon an attorney, or involuntarily transferring a member of the North Carolina State Bar to disability inactive status to the North Carolina Court of Appeals. Review by the appellate division shall be upon matters of law or legal inference. The procedures governing any such appeal shall be as provided by statute or court rule for appeals in civil cases. A final order which imposes disbarment or suspension for 18 months or more shall not be stayed except upon application, under the rules of the Court of Appeals, for a writ of supersedeas. A final order imposing suspension for less than 18 months or any other discipline except disbarment shall be stayed pending determination of the appeal.

(i) The North Carolina State Bar may invoke the process of the General Court of Justice to enforce the powers of the council or any committee to which the council delegates its authority.

(j) The North Carolina State Bar may apply to appropriate courts for orders necessary to protect the interests of clients of missing, disabled, incapacitated or deceased attorneys.

The senior regular resident judge of the superior court of any district wherein a member of the North Carolina State Bar resides or maintains an office shall have the authority and power to enter such orders as are necessary to protect the interests of such clients, including the authority to order the payment of counsel fees from the estate of the member to any attorney appointed to administer or conserve the law practice of the member. (1933, c. 210, s. 11; 1937, c. 51, s. 3; 1959, c. 1282, ss. 1, 2; 1961, c. 1075; 1969, c. 44, s. 61; 1975, c. 582, s. 5; 1979, c. 570, ss. 6, 7; 1983, c. 390, ss. 2, 3; 1985, c. 167; 1987, c. 316, s. 4; 1989, c. 172, s. 2; 1991, c. 210, s. 5.)

Effect of Amendments. —

The 1987 amendment, effective June 8, 1987, rewrote the fourth sentence of subsection (h), which read "During the period from the ratification of this act [May 10, 1985] to October 1, 1987, a final order which imposes disbarment or suspension for 18 months or more shall not be stayed except upon application, under the rules of the Court of Appeals, for a writ of supersedeas."

The 1989 amendment, effective May 31, 1989, substituted "Rules of Professional Conduct" for "Code of Professional Responsibility" in subdivision (b)(2).

The 1991 amendment, effective October 1, 1991, inserted "guilty or" in subdivision (b)(1); in subdivision (c)(2), substituted "up to but not exceeding five" for "not exceeding three" and deleted "for a period not exceeding three years" preceding "unreasonable conditions"; in subdivision (c)(3) substituted "Censure" for "Public censure" and added the language defining "censure"; in subdivision (c)(4) substituted "Reprimand" for "Private reprimand" and added the language defining "reprimand"; added subdivision (c)(5); added the last sentence of the last paragraph of subsection (c); inserted "guilty or" in subsection (d); inserted "disability" preceding "inactive status" in subsection (g); and, in the first sentence of subsection (h), inserted "admonition," substituted "involuntarily" for "involuntary," inserted "disability," and substituted "to the North Carolina Court of Appeals" for "for mental incompetence or physical disability, to the appellate division."

Legal Periodicals. —

For article, "Malpractice and Ethical Considerations," see 19 N.C. Cent. L.J. 165 (1991).

CASE NOTES

I. General Consideration.
II. Sanctions.
III. Appeals.

I. GENERAL CONSIDERATION.

Findings Must Be Supported by Evidence. — In attorney discipline and disbarment proceedings, findings of fact must be supported by clear, cogent, and convincing evidence drawn from the whole record. North Carolina State Bar v. Speckman, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

Failure to Comply with Grievance Committee Subpoena. — A subpoena is a type of "formal inquiry" contemplated by the General Assembly in defining the grounds for attorney discipline under subdivision (b)(3) of this section; thus, where the defendant attorney failed to produce documents as required by a Grievance Committee subpoena, he was subject to discipline as a result and the Hearing Committee did not err in concluding that defendant violated subdivision (b)(3) of this section. North Carolina State Bar v. Speckman, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

Loss of Right to Claim Negligence of Attorney by Pursuing Initial Claim. — Where wife had a claim for permanent alimony which was lost by the negligence of her attorney, she then retained another attorney who filed a counterclaim for alimony, and the alimony agreement negotiated by the first attorney was rescinded and a second alimony agreement was signed, by pursuing her claim for alimony against her husband the wife lost her right to make a claim against the first attorney for his negligence in representing the plaintiff in her original alimony claim. Stewart v. Herring, 80 N.C. App. 529, 342 S.E.2d 566 (1986).

II. SANCTIONS.

Sanctions Authorized by Statute Not Subject to Review. — Where an attorney's sanction, a one-year suspension, was by her own admission authorized by statute, it was not subject to review. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

So long as the punishment imposed is within the limits allowed by statute, the Court of Appeals does not have the authority to modify or change it. North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60 (1986), aff'd, 319 N.C. 354, 354 S.E.2d 501 (1987).

III. APPEALS.

"Whole Record" Test. — The test for determining whether the findings of the disciplinary committee are supported by the evidence is the "whole record" test. Under this test there must be substantial evidence, based on a review of the record, to support the committee's findings, conclusions and results. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

"Whole record test" is standard for judicial review of attorney discipline cases and requires the reviewing court to consider the evidence which in and of itself justifies or supports the administrative findings and also to take into account the contradictory evidence or evidence from which conflicting inferences can be drawn. The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion. North Carolina State Bar v. Speckman, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

Power of Reviewing Court to Modify or Change Imposed Punishment. — So long as the punishment imposed is within the limits allowed by the statute the court does not have the authority to modify or change it. North Carolina State Bar v. Nelson, 107 N.C. App. 543, 421 S.E.2d 163 (1992), aff'd per curiam, 333 N.C. 786, 429 S.E.2d 716 (1993).

§ 84-29. Evidence and witnesses.

CASE NOTES

Quoted in North Carolina State Bar v. Speckman, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

§ 84-34. Membership fees and list of members.

Every active member of the North Carolina State Bar shall, prior to the first day of July of each year, beginning with the year 1990, pay to the secretary-treasurer an annual membership fee of one hundred thirty-five dollars ($135.00), and every member shall notify the secretary-treasurer of his correct post-office address. All duties for prior years shall be as were set forth in the General Statutes then in effect. The said membership fee shall be regarded as a service charge for the maintenance of the several services prescribed in this Article, and shall be in addition to all fees now required in connection with admissions to practice, and in addition to all license taxes now or hereafter required by law. The said fee shall not be prorated: Provided, that no fee shall be required of an attorney licensed after this Article shall have gone into effect until the first day of January of the calendar year following that in which he shall have been licensed; but this proviso shall not apply to attorneys from other states admitted on certificate. The said fees shall be disbursed by the secretary-treasurer on the order of the council. The secretary-treasurer shall annually, at a time and in a law magazine or daily newspaper to be prescribed by the council, publish an account of the financial transaction of the council in a form to be prescribed by it. The secretary-treasurer shall compile and keep currently correct from the names and post-office addresses forwarded to him and from any other available sources of information a list of members of the North Carolina State Bar and furnish to the clerk of the superior court in each county, not later than the first day of October in each year, a list showing the name and address of each attorney for that county who has not complied with the provisions of this Article. The name of each of the active members who shall be in arrears in the payment of membership fees for one or more calendar years shall be furnished to the presiding judge at the next term of the superior court after the first day of October of each year, by the clerk of the superior court of each county wherein said member or members reside, and the court shall thereupon take such action as is necessary and proper. The names and addresses of such attorneys so certified shall be kept available to the public. The Secretary of Revenue is hereby directed to supply the secretary-treasurer, from his record of license tax payments, with any information for which the secretary-treasurer may call in order to enable him to comply with this requirement.

The said list submitted to several clerks of the superior court shall also be submitted to the council of the North Carolina State Bar at its October meeting of each year and it shall take such action thereon as is necessary and proper. (1933, c. 210, s. 17; 1939, c. 21, ss. 2, 3; 1953, c. 1310, s. 5; 1955, c. 651, s. 4; 1961, c. 760; 1971, c. 18; 1973, c. 476, s. 193; c. 1152, s. 4; 1977, c. 841, s. 2; 1981, c. 788, s. 5; 1989, c. 172, s. 1.)

Effect of Amendments. — The 1989 amendment, effective May 31, 1989, in the first sentence substituted "the year 1990" for "the year 1982", and substituted "one hundred thirty-five dollars ($135.00)" for "ninety dollars ($90.00)."

§ 84-34.1. Deposits of the North Carolina State Bar.

Deposits of the North Carolina State Bar, its boards, agencies, and committees shall be secured as provided in G.S. 159-31(b). (1991, c. 210, s. 3.)

Editor's Note. — Session Laws 1991, c. 210, s. 6 made this section effective October 1, 1991.

§ 84-36. Inherent powers of courts unaffected.

CASE NOTES

Concurrent Power of Supreme Court and Bar to Regulate Conduct of Attorneys. — While questions of propriety and ethics are ordinarily for the consideration of the bar, because that organization was expressly created by the legislature to deal with such questions, nevertheless the power to regulate the conduct of attorneys is held concurrently by the Bar and the Supreme Court. Therefore, in a proper case, the Court may rule on questions concerning the conduct of attorneys. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

General Assembly Cannot Abridge Inherent Power. — The existence of inherent judicial power is not dependent upon legislative action; however, the General Assembly has recognized the existence of the inherent power of the court and the General Assembly cannot abridge that power. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

The Judicial Method Is Not Dependent, etc. —

In accord with the main volume. See In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

Form of Disciplinary Action. — Judicial disciplinary action may take the form of an order of disbarment or suspension of the attorney's privilege to practice law. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

Disbarment Order Supported by Contempt Conviction. — The trial court's findings of fact supported order disbarring respondent attorney, where respondent was convicted of contempt for soliciting someone to disrupt a criminal trial in which he, respondent, represented the defendant. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

Error in Dismissing Grievance Filed with State Bar. — North Carolina State Bar and the trial courts of this State share concurrent jurisdiction over matters of attorney discipline; therefore, where individual filed a civil claim against attorney for alleged impropriety in handling an estate, and also filed a grievance with the State Bar alleging that the attorney's actions violated the Rules of Professional Conduct, the trial court erred in naming the State Bar as a party and dismissing the grievance proceeding against the defendant. North Carolina State Bar v. Randolph, 325 N.C. 699, 386 S.E.2d 185 (1989).

Client Security Fund Constitutional. — The order of the North Carolina Supreme Court establishing the Client Security Fund and requiring annual payments by attorneys to the Fund is an essential corollary to the court's function, was required for the proper administration of justice, and did not violate the North Carolina Constitution. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

§ 84-38. (Effective October 1, 1994 — See editor's note) Solicitation of retainer or contract for legal services prohibited; division of fees.

It shall be unlawful for any person, firm, corporation, or association or his or their agent, agents, or employees, acting on his or their behalf, to solicit or procure through solicitation either directly or indirectly, any legal business, whether to be performed in this State or elsewhere, or to solicit or procure through solicitation either directly or indirectly, a retainer or contract, written or oral, or any agreement authorizing an attorney or any other person, firm, corporation, or association to perform or render any legal services, whether to be performed in this State or elsewhere.

It shall be unlawful for any person, firm, corporation, or association to divide with or receive from any attorney-at-law, or group of attorneys-at-law, whether practicing in this State or elsewhere, either before or after action is brought, any portion of any fee or compensation charged or received by such attorney-at-law, or any valuable consideration or reward, as an inducement for placing or in consideration of being placed in the hands of such attorney or attorneys-at-law, or in the hands of another person, firm, corporation or association, a claim or demand of any kind, for the purpose of collecting such claim or instituting an action thereon or of representing claimant in the pursuit of any civil remedy for the recovery thereof, or for the settlement or compromise thereof, whether such compromise, settlement, recovery, suit, claim, collection or demand shall be in this State or elsewhere. This paragraph shall not apply to agreements between attorneys to divide compensation received in cases or matters legitimately, lawfully and properly received by them.

Any person, firm, corporation or association of persons violating the provisions of this section shall be guilty of a Class 1 misdemeanor.

The council of the North Carolina State Bar is hereby authorized and empowered to investigate and bring action against persons charged with violations of this section and the provisions as set forth in G.S. 84-37 shall apply. Nothing contained herein shall be construed to supersede the authority of district attorneys to seek injunctive relief or institute criminal proceedings in the same manner as provided for in G.S. 84-7. Nothing herein shall be construed as abridging the inherent powers of the courts to deal with such matters. (1947, c. 573; 1973, c. 47, s. 2; 1993, c. 539, s. 599; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and punished by a fine or imprisonment or both in the discretion of the court" in the third paragraph.

Chapter 85B.

Auctions and Auctioneers.

Sec.
85B-4. Licenses required.
85B-6. Fees; local governments not to charge fees or require licenses.
85B-7.1. Handling clients' funds.
85B-9. (See editor's note for date change) Penalties and enforcement.

§ 85B-1. Definitions.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 85B-4. Licenses required.

(a) No person who is not exempt under G.S. 85B-2, shall sell, or offer to sell, goods or real estate at auction in this State or perform any act for which an auction firm license is required unless the person holds a currently valid license issued under this Chapter.

(b) No person shall be licensed as an apprentice auctioneer, auctioneer, or receive an auction firm license if the person:

(1) Is under 18 years of age;
(2) Repealed by Session Laws 1983, c. 751, s. 6.
(3) Has within the preceding five years pleaded guilty to, entered a plea of nolo contendere or been convicted of any felony, or committed or been convicted of any act involving fraud or moral turpitude;
(4) Has had an auctioneer or apprentice auctioneer or auction firm license revoked; or
(5) Has, within the preceding five years, committed any act which constitutes grounds for license suspension or revocation under this Chapter or a Commission rule.

(c) Each applicant for an apprentice auctioneer license shall submit a written application in a form approved by the Commission and containing at least two statements by residents of the community in which the applicant resides attesting to the applicant's good moral character.

(c1) Each apprentice auctioneer application and license shall name a licensed auctioneer to serve as the supervisor of the apprentice. No apprentice auctioneer may enter into an agreement to conduct an auction, or conduct an auction, without the express approval of his supervisor. The supervisor shall review all contracts before approving them and shall regularly review the records his apprentice is required to maintain under G.S. 85B-7 to see that they are accurate and current, and shall perform such other supervisory duties as may be required by the Commission.

(d) No person shall be licensed as an auctioneer unless the person has held an apprentice auctioneer license and served as an apprentice auctioneer for the two preceding years, accumulated sufficient knowledge and experience in such areas of the auctioneer profession as the Commission may deem appropriate, and has taken an examination approved by the Commission and performed on it to the satisfaction of the Commission. The examination shall test the applicant's understanding of the law relating to auctioneers and auctions, ethical practices for auctioneers, the mathematics applicable to the auctioneer business, and such other matters relating to auctions as the Commission considers appropriate. The examination shall be given at least twice each year in Raleigh, and at other times and places the Commission designates, but no person shall be allowed to take the examination within six months after having failed it a second time.

Any person who has been in the auctioneer business in this State for at least two years prior to the effective date of this act [July 1, 1973], and who makes proper application to the Commission within one year after July 1, 1973, may be licensed as an auctioneer without holding an apprentice license and serving as an apprentice of two years, and without taking the examination required by this subsection. Any person who has successfully completed the equivalent of at least 80 hours of classroom instruction in a course in auctioneering at an institution approved by the Commission may be licensed as an auctioneer without holding an apprentice license and serving as an apprentice for two years, but must take the examination required by this subsection and perform on it to the satisfaction of the Commission.

Each applicant for an auctioneer license shall submit a written application in a form approved by the Commission. If the applicant has been previously licensed as an apprentice auctioneer, the application shall contain an evaluation by the applicant's supervisor of the applicant's performance as an apprentice auctioneer and the applicant's performance in specific areas as required by the Commission. If the applicant is exempted from apprenticeship after completion of the equivalent of at least 80 hours of classroom instruction in auctioneering, the application shall contain a transcript of the applicant's course work in auctioneering. Each application shall be accompanied by statements of at least two residents of the community in which the applicant resides attesting to the applicant's good moral character. The Commission may require verification of any information included in an application for an auctioneer license and may request other information or verification of information provided to determine whether the applicant possesses the good moral character or other qualifications for licensure.

(e) Each license issued under this Chapter shall be valid from July 1 of the year issued, or from the date issued, whichever is later, to the following June 30 unless sooner revoked or suspended pursuant to this Chapter or a rule of the Commission. A license may be renewed for one year at a time, except an apprentice auctioneer license may not be renewed for more than three times. No examination shall be required for renewal of an auctioneer license if the application for renewal is made within 24 months of the expiration of the previous license.

(f) No person shall be issued an auctioneer or apprentice auctioneer license until the person has made the contribution to the Fund as required by G.S. 85B-4.1.

(g) An auction firm must be licensed by the Board even though no owner or officer of the firm acts as an auctioneer. To be licensed an auction firm must make the contribution to the Fund as required by G.S. 85B-4.1 and must pay the proper fees as set out in

G.S. 85B-6. Auction firms are covered by the provisions of G.S. 85B-8.

An auction firm license issued by the Commission is restricted to the persons named in the license and does not inure to the benefit of any other person. Where a license is issued to an auction firm, authority to transact business under the license is limited to the person or persons designated in the application and named in the license.

The designated person or persons, prior to being licensed, shall be required to take a written examination, approved by the Commission, and demonstrate to the satisfaction of the Commission a thorough understanding of the law relating to the conduct of the auction business and other matters the Commission deems appropriate. An individual who is licensed as an auctioneer and who is the designated person applying for an auction firm license is not required to take the auction firm examination. Licensed real estate brokers and real estate firms may be exempt from the auction firm examination provided they employ or associate themselves with a licensed auctioneer to handle those aspects of the transactions peculiar to the auctioneer profession. Any person or entity, on the effective date of this Chapter, duly licensed as an auction firm in good standing is not required to take any examination in order to maintain or to renew an auction firm license provided that the license does not otherwise expire or lapse and is not suspended or revoked by the Commission.

(h) The Commission shall publish at least once a year a list of names and addresses of all persons, sole proprietorships, partnerships and corporations holding valid apprentice auctioneer, auctioneer, or auction firm licenses.

(i) The Commission may investigate as it deems necessary the ethical background of any applicant for licensure under this Chapter. (1973, c. 552, s. 4; c. 1195, ss. 1, 2; 1975, c. 648, ss. 2-4; 1983, c. 603, s. 4; c. 751, ss. 6-8; 1989, c. 732, s. 1; 1991 (Reg. Sess., 1992), c. 819, s. 4; c. 1030, s. 51.5; 1993, c. 421, s. 3.)

Effect of Amendments. — The 1993 amendment, effective July 21, 1993, and applicable to fees due on or after that date, in the first sentence of the first paragraph of subsection (g), substituted "by the Board" for "as an auctioneer business" and substituted "the firm" for "that business".

§ 85B-6. Fees; local governments not to charge fees or require licenses.

(a) The Commission shall collect and remit to the State Treasurer fees in an amount not to exceed the following:

Item	Maximum Fee
Apprentice Auctioneers:	
Application for license	$ 50.00
Issuance or renewal of license	50.00
Auctioneers:	
Application for license	50.00
Examination	25.00
Issuance or renewal of license	100.00
Auction Firms:	

Item	Maximum Fee
Application for license	50.00
Examination	25.00
Issuance or renewal of license	100.00
Reinstatement of License	25.00.

An application fee for a license and an examination fee are nonrefundable. The amount payable by a nonresident under G.S. 85B-5 to obtain a nonresident reciprocal auctioneer license is the greater of the amount set in the above table for an examination for and the issuance of an auctioneer's license and the amount the nonresident's state would charge a resident auctioneer of this State to obtain a comparable license from that state.

A reinstatement fee is payable when a person applies for renewal of a license after the license has lapsed for failure to renew it before it expired. The reinstatement of a lapsed license is not retroactive in effect and does not limit the authority of the courts or of the Commission to take disciplinary action against a person who engages in the auctioneer profession with a lapsed license.

(b) No local government or agency of local government may charge any fees or require any licenses for auctioneers, apprentice auctioneers, or auction firms in addition to those set out in this Chapter. (1973, c. 552, s. 6; c. 1195, s. 3; 1975, c. 648, s. 5; 1977, 2nd Sess., c. 1219, s. 43.7; 1983, c. 751, s. 12; 1991 (Reg. Sess., 1992), c. 819, s. 18; 1993, c. 421, s. 1.)

Effect of Amendments. — The 1993 amendment, effective July 21, 1993, and applicable to fees due on or after that date, rewrote subsection (a) and in subsection (b) substituted "auction firms" for "auctioneer businesses".

§ 85B-7.1. Handling clients' funds.

(a) Each licensee shall maintain a trust or escrow account and shall deposit in the account all funds that are received for the benefit of another person and are not disbursed to the seller on auction day. The licensee shall deposit funds that are not disbursed on auction day with an insured bank or savings and loan association located in North Carolina. A licensee who disburses funds on auction day shall prepare a receipt or settlement statement for the disbursed funds that contains the name and address of the person receiving the disbursement and the amount of the disbursement. The receipt or statement shall be signed by the licensee and the person receiving the disbursement.

(b) Each licensee shall maintain, for not less than five years, complete records showing the deposit, maintenance, and withdrawal of trust or escrow funds and the disbursement of funds on auction day. Records of the disbursement of funds on auction day shall include a copy of each receipt or settlement statement issued when the funds were disbursed. The Commission or its designated agent may inspect these records periodically, without prior notice, and may also inspect these records whenever the Commission determines that they are pertinent to an investigation of any specific complaint against a licensee. (1991 (Reg. Sess., 1992), c. 819, s. 20; 1993, c. 421, s. 2.)

Effect of Amendments. — The 1993 amendment, effective July 21, 1993, and applicable to fees due on or after that date, in subsection (a), in the first sentence added "that are" preceding "received for the benefit", added at the end "and are not disbursed to the seller on auction day", in the second sentence, substituted "The licensee" for "The funds" and substituted "deposit funds that are not disbursed on auction day" for "be deposited", and added the last two sentences; and in subsection (b), in the first sentence added at the end "and the disbursement of funds on auction day", added the second sentence, and made other stylistic changes.

§ 85B-9. (See editor's note for date change) Penalties and enforcement.

(a) **(Effective October 1, 1994 — See editor's note)** Any person, corporation or association of persons violating the provisions of G.S. 85B-4(a) shall be guilty of a Class 1 misdemeanor.

(b) The Commission may in its own name seek injunctive relief in the General Court of Justice to restrain any violation or anticipated violation of the provisions of G.S. 85B-4(a) or any violation of this Chapter.

(c) The Commission shall be entitled to the services of the Attorney General of North Carolina in enforcing the provisions of this Chapter or may employ an attorney to assist and represent it in enforcement of specific matters. (1973, c. 1195, s. 6; 1975, c. 648, s. 7; 1991 (Reg. Sess., 1992), c. 819, s. 22; 1993, c. 539, s. 600; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. —

The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and shall be punished by fine, or imprisonment, or both, in the discretion of the court" in subsection (a).

Chapter 86A.

Editor's Note. — The legislation and annotations affecting Chapter 86A have been included in a recently published replacement chapter.

Chapter 87.

Editor's Note. — The legislation and annotations affecting Chapter 87 have been included in a recently published replacement chapter.

Chapter 88.

Cosmetic Art.

Sec.
88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.
88-4. Beauty parlor, etc.
88-12.1. Temporary employment permit for applicants for examination.

Sec.
88-23.1. Bond required for cosmetic art schools.
88-28. (Effective October 1, 1994 — See editor's note) Acts made misdemeanors.

§ 88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.

(a) On and after June 30, 1933, no person or combination of persons shall, for pay or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the State of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this Chapter by the State Board of Cosmetic Art Examiners hereinafter established and, except as provided in G.S. 88-7.1; the practice of cosmetic art shall not be performed outside of a licensed and regularly inspected beauty establishment.

(b) The operator of a cosmetic art shop, beauty parlor or hairdressing establishment may employ unlicensed personnel to do shampooing only, where the shampooing is done under the supervision of a registered cosmetologist. As used in this paragraph, "shampooing" includes only the application of shampoo to hair and the removal of the shampoo from the hair, and does not include any arranging, dressing, waving, marcelling or other treatment of hair. This paragraph does not apply to barbershops. This paragraph shall not apply to the following counties: Guilford, Mecklenburg, Onslow, Richmond, Sampson.

(c) On and after February 1, 1976, any person, firm or corporation, before establishing or opening a cosmetic art shop not heretofore licensed by the State Board of Cosmetic Art, shall make application to the Board, on forms to be furnished by the Board, for a permit to operate a cosmetic art shop. As a part of the application, the person, firm, or corporation shall list all registered cosmetologists who will practice cosmetic art in that cosmetic art shop and shall identify each cosmetologist as an employee or a booth renter. The shop of such applicant shall be inspected and approved by the State Board of Cosmetic Art by an agent designated for such purpose by the Board before such cosmetic art shop shall be opened for business. It shall be unlawful to open a new cosmetic art shop for the practice of cosmetology until such shop has been inspected, as heretofore required, and determined by the Board to be in compliance with the requirements set forth in this Chapter. Upon the determination by the Board that the applicant has complied with the requirements of this Chapter, the Board shall issue to such applicant a permit to operate a cosmetic art shop. A fee of twenty-five dollars ($25.00) shall be paid to the Board for the inspection of a cosmetic art shop. Such fee must accompany the application for a permit to operate a cosmetic art shop at the time such application is filed with the Board.

(d) All cosmetic art shops in operation as of February 1, 1976, shall be required to make application to the Board of Cosmetic Art, on forms supplied by the Board, for a permit to operate. The fee required for such permit shall be three dollars ($3.00) per active booth in said shop.

(e) All permits shall be renewed as of the first day of February of each and every year, and the fee for annual renewal of cosmetic art shop permits shall be as set forth in G.S. 88-21. As a part of the renewal of the permit, the person, firm, or corporation shall list all registered cosmetologists who currently practice cosmetic art in that cosmetic art shop and shall identify each cosmetologist as an employee or a booth renter. No permit or certificate shall be transferable from one location to another or from one owner to another at the same location. Each cosmetic art shop permit shall be conspicuously posted within such cosmetic art shop for which same is issued. (1933, c. 179, s. 1; 1973, c. 1481, ss. 1, 2; 1975, c. 7; c. 857, s. 1; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985 (Reg. Sess., 1986), c. 833; 1987 (Reg. Sess., 1988), c. 965; 1993, c. 22, s. 2; c. 54, s. 1.)

Effect of Amendments. — Session Laws 1993, c. 22, s. 2, effective April 14, 1993, added the subsection (a) through (e) designations; in subsection (c) added the second sentence; in the first sentence of subsection (e) substituted "All" for "Thereafter, all" and added the second sentence of subsection (e).

Session Laws 1993. c. 54, s. 1, effective May 19, 1993, added the subsection (a) through (c) designations and in subsection (b), in the last sentence, deleted "Jones, Lenoir" preceding "Mecklenburg".

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 88-4. Beauty parlor, etc.

"Cosmetic art shop," "beauty parlor," or "hairdressing establishment" is any building, or part thereof wherein cosmetic art is practiced, and a "beauty school," "beauty college," or "beauty academy" is any building or part thereof wherein cosmetic art is taught. Booth space rented by an independent contractor within a cosmetic art shop, beauty parlor, or hairdressing establishment is not a separate cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 4; 1981, c. 615, s. 3; 1993, c. 22, s. 1.)

Effect of Amendments. — The 1993 amendment, effective April 14, 1993, added the second sentence.

§ 88-12.1. Temporary employment permit for applicants for examination.

(a) Any person who has completed the classroom hour requirements under this Chapter for registration as a cosmetologist or an apprentice cosmetologist, has applied and is qualified to take the State Board examination for registration as a cosmetologist or an apprentice cosmetologist, and has otherwise complied with this section may apply to the Board of Cosmetic Art Examiners for a temporary permit to be employed and engage in the practice of cosmetology under the direct supervision of a registered cosmetologist.

(b) Temporary employment permits shall be issued by the Board provided that the following conditions are satisfied:

(1) Within six months of having met the classroom hour requirements for registration under this Chapter, the applicant for a temporary employment permit has applied and is qualified to take the Board's examination for registration as an apprentice cosmetologist or registered cosmetologist.

(2) Except as otherwise provided in subparagraph (3) of this section, a permit issued to the qualifying individual for the first time shall be valid for not more than six months from the date that the permit applicant has met the classroom hour requirements for registration as a cosmetologist or apprentice cosmetologist.

(3) If the holder of a temporary employment permit does not pass the examination that he took during the period that the permit was valid or within 30 days of permit expiration, and if at the time the examination results are published the permit has expired or will expire within 30 days of such publication, the permit holder may apply to the Board to have the temporary employment permit extended for a period not to exceed three months from the date of publication by the Board of the results of the examination taken and not passed by the individual, provided that the applicant for a permit extension has applied and is qualified to retake the examination within the same three-month period. A permit shall not be extended more than one time for the same individual.

(c) The Board shall issue a temporary employment permit or permit extension to any individual who applies and meets the requirements for the permit or extension, as appropriate, as provided in this section.

(d) The holder of a valid temporary employment permit issued by the Board may engage in the practice of cosmetic art as defined under G.S. 88-2, provided that such practice is under the direct supervision of a registered cosmetologist. Nothing in this section may be construed to allow the holder of a valid temporary employment permit to operate, manage, or maintain a cosmetic art shop, beauty parlor, or hairdressing establishment, regulated under the provisions of this Chapter.

(e) The Board shall adopt rules necessary to implement the provisions of this section. (1989 (Reg. Sess., 1990), c. 1013, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 20.)

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective July 24, 1992, substituted "three-month period" for "six-month period" in the next to last sentence of subdivision (b)(3).

§ 88-23.1. Bond required for cosmetic art schools.

(a) Each cosmetic art school shall provide a guaranty bond unless the school has already provided a bond or an alternative to a bond under G.S. 115D-95.

The Board of Cosmetic Art may refuse to renew or may suspend or revoke the approval of a school that fails to maintain a bond or an alternative to a bond pursuant to this section or G.S. 115D-95.

(b)(1) When application is made for an approval or approval renewal, the applicant shall file a guaranty bond with the clerk of the superior court of the county in which the school will be located. The bond shall be in favor of the students. The bond shall be executed by the applicant as principal and by a bonding company authorized to do business in this State. The bond shall be conditioned to provide indemnification to any student, or his parent or guardian, who has suffered loss of tuition or any fees by reason of the failure of the school to offer or complete student instruction, academic services, or other goods and services related to course enrollment for any reason, including but not limited to the suspension, revocation, or nonrenewal of a school's approval, bankruptcy, foreclosure, or the school ceasing to operate.

(2) The bond shall be in an amount determined by the Board of Cosmetic Art to be adequate to provide indemnification to any student, or his parent or guardian, under the terms of the bond. The bond amount for a school shall be at least equal to the maximum amount of prepaid tuition held at any time during the last fiscal year by the school. The bond amount shall also be at least ten thousand dollars ($10,000).

Each application for a license shall include a letter signed by an authorized representative of the school showing in detail the calculations made and the method of computing the amount of the bond, pursuant to this subdivision and the rules of the Board. If the Board finds that the calculations made and the method of computing the amount of the bond are inaccurate or that the amount of the bond is otherwise inadequate to provide indemnification under the terms of the bond, the Board may require the applicant to provide an additional bond.

(3) The bond shall remain in force and effect until cancelled by the guarantor. The guarantor may cancel the bond upon 30 days notice to the Board of Cosmetic Art. Cancellation of the bond shall not affect any liability incurred or accrued prior to the termination of the notice period.

(c) An applicant that is unable to secure a bond may seek a waiver of the guaranty bond from the Board of Cosmetic Art and approval of one of the guaranty bond alternatives set forth in this subsection. With the approval of the Board, an applicant may file with the clerk of the superior court of the county in which the school will be located, in lieu of a bond:

(1) An assignment of a savings account in an amount equal to the bond required (i) which is in a form acceptable to the Board of Cosmetic Art; (ii) which is executed by the applicant; and (iii) which is executed by a state or federal sav-

ings and loan association, state bank, or national bank, that is doing business in North Carolina and whose accounts are insured by a federal depositors corporation; and (iv) for which access to the account in favor of the State of North Carolina is subject to the same conditions as for a bond in subsection (b) of this section.

(2) A certificate of deposit (i) which is executed by a state or federal savings and loan association, state bank, or national bank, which is doing business in North Carolina and whose accounts are insured by a federal depositors corporation; and (ii) which is either payable to the State of North Carolina, unrestrictively endorsed to the Board of Cosmetic Art; in the case of a negotiable certificate of deposit, is unrestrictively endorsed to the Board of Cosmetic Art; or in the case of a nonnegotiable certificate of deposit, is assigned to the Board of Cosmetic Art in a form satisfactory to the Board; and (iii) for which access to the certificate of deposit in favor of the State of North Carolina is subject to the same conditions as for a bond in subsection (b) of this section. (1989 (Reg. Sess., 1990), c. 824, s. 4; 1991, c. 636, s. 5.)

Effect of Amendments. — The 1991 amendment, effective July 11, 1991, substituted "($10,000)" for "($10.000)" in subdivision (b)(2).

§ 88-28. (Effective October 1, 1994 — See editor's note) Acts made misdemeanors.

Each of the following constitutes a Class 3 misdemeanor:

(1) The violation of any of the provisions of G.S. 88-1.

(2) Permitting any person in one's employ, supervision, or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.

(3) Permitting any person in one's employ, supervision, or control, to practice as a cosmetologist unless that person has a certificate as a registered cosmetologist.

(3a) Employing or permitting any person in one's employ, supervision, or control, to engage in the practice of cosmetic art under an invalid temporary employment permit.

(4) Obtaining, or attempting to obtain, a certificate of registration for money other than the required fee or any other thing of value, or by fraudulent misrepresentations.

(5) Practicing or attempting to practice by fraudulent misrepresentations.

(6) The willful failure to display a certificate of registration as required by G.S. 88-24.

(7) The willful violation of the reasonable rules and regulations adopted by the State Board of Cosmetic Art Examiners. (1933, c. 179, s. 28; 1949, c. 505, s. 2; 1973, c. 476, s. 128; 1975, c. 857, s. 8; 1981, c. 614, s. 2; c. 615, s. 17; 1989 (Reg. Sess., 1990), c. 1013, s. 3; 1993, c. 539, s. 608; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor punishable upon conviction by a fine of not less than twenty-five dollars ($25.00) and not more than one hundred dollars ($100.00), or up to 30 days in jail, or both" in the introductory language.

Chapter 88A.

Editor's Note. — The legislation and annotations affecting Chapter 88A have been included in a recently published replacement chapter.

Chapter 89A.

Landscape Architects.

Sec.
89A-8. (See editor's note for date change) Violation a misdemeanor; injunction to prevent violation.

§ 89A-1. Definitions.

Cross References. — As to limited liability companies and their powers, see § 57C-2-01 et seq.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 89A-8. (See editor's note for date change) Violation a misdemeanor; injunction to prevent violation.

(a) **(Effective October 1, 1994 — See editor's note)** It shall be a Class 1 misdemeanor for any person to use, or to hold himself out as entitled to practice under, the title of landscape architect or landscape architecture unless he is duly registered under the provisions of this Chapter.

(b) The Board may appear in its own name in the courts of the State and apply for injunctions to prevent violations of this Chapter. (1969, c. 672, s. 8; 1973, c. 1331, s. 3; 1987, c. 827, s. 72; 1993, c. 539, s. 610; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (a).

Chapter 89B.

Foresters.

Sec.
89B-2. Definitions.
89B-10. Application and registration fees.
89B-11. Expiration and renewals..
Sec.
89B-15. (Effective October 1, 1994 — See editor's note) Violation and penalties.

§ 89B-2. Definitions.

As used in this Chapter:

(1) "Board" shall mean the State Board of Registration for Foresters, provided for by this Chapter.

(2) "Forester" means a person who by reason of his special knowledge and training in natural sciences, mathematics, silviculture, forest protection, forest mensuration, forest management, forest economics, and forest utilization is qualified to engage in the practice of forestry as hereinafter defined.

(3) "Practicing" means giving professional forestry services, including but not limited to, consultation, investigation, evaluation, education, planning, or responsible supervision of any forestry activities requiring knowledge, and training in and experience of forestry principles and techniques.

(4) "Registered forester" means a person who has been registered pursuant to this Chapter.

(5) "Consulting forester" means a person who:

a. Is registered by the State Board of Registration for Foresters;

b. Is a technically educated professional forester who is a graduate of a forestry curriculum of a college or university and who holds a bachelor's or higher degree in forestry; or has shown equivalent knowledge by passing the written examination administered by the State Board of Registration for Foresters as provided in this Chapter;

c. Is governed by the Code of Ethics of the Society of American Foresters;

d. Is competent to practice forest management, appraisal, development, marketing, protection, and utilization for the benefit of the general public on a fee, contractual, or contingency basis;

e. Has not engaged in any practice that constitutes a conflict of interest or in any way diminishes his ability to represent the best interests of his clients; and

f. Has filed annually an affidavit with the State Board of Registration of Foresters attesting to his compliance with the conditions of this Chapter. (1975, c. 531, s. 2; 1989, c. 169.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, and applicable for applications for registration submitted on or after that date, added subdivision (5).

§ 89B-10. Application and registration fees.

Applications for registration shall be made on forms prescribed and furnished by the Board. The application fee for a certificate of registration as a registered forester shall be fifteen dollars ($15.00), which shall accompany the application. An additional twenty dollars ($20.00) shall be paid upon issuance of the certificate of registration. Should the applicant fail or refuse to remit the certificate fee within 30 days after being notified in the usual manner that the applicant has successfully qualified, he forfeits the right to have the certificate so issued and said applicant may be required again to submit an original application fee therefor. Should the Board deny the issuance of a certificate of registration to any applicant, the initial application fee deposited by the applicant shall be retained by the Board. (1975, c. 531, s. 10; 1989, c. 245, s. 1.)

Effect of Amendments. — The 1989 amendment, effective June 6, 1989 and applicable to registration, renewal, and replacement fees due on or after that date, in the third sentence, substituted "twenty dollars" for "fifteen dollars," and substituted "($20.00)" for "($15.00)."

§ 89B-11. Expiration and renewals.

Registrations shall expire on the last day of June following issuance or renewal and shall become invalid after that date unless renewed. It shall be the duty of the secretary of the Board to notify, at his last registered address, every person registered under this Chapter of the date of the expiration of his registration and the amount of fee which shall be required for its renewal for one year. Such notices shall be mailed at least 30 days in advance of the expiration date of such registrations. The annual renewal fee for certificates shall be twenty dollars ($20.00). The fee for issuance of replacement certificates of registration shall be five dollars ($5.00).

Any registration which has expired may be renewed by paying a fee of twenty dollars ($20.00) plus one dollar ($1.00) per calendar month from the date of expiration. Charges above the renewal fee shall not exceed twenty dollars ($20.00). (1975, c. 531, s. 11; 1989, c. 245, s. 2.)

Effect of Amendments. — The 1989 amendment, effective June 6, 1989 and applicable to registration, renewal, and replacement fees due on or after that date, in the fourth sentence of the first paragraph and in the second paragraph, substituted "twenty dollars" for "ten dollars," and substituted "($20.00)" for "($10.00)."

§ 89B-15. (Effective October 1, 1994 — See editor's note) Violation and penalties.

Any person who, without being registered in accordance with the provisions of this Chapter, shall use in connection with his name or otherwise assume, use or advertise any title or description tending to convey the impression that he is a registered forester; or any person who shall give any false or forged information of any kind to the Board or to any member thereof in obtaining a certificate of registration; or any person, firm, partnership or corporation who shall violate any of the provisions of this Chapter shall be guilty of a Class 3 misdemeanor. (1975, c. 531, s. 15; 1993, c. 539, s. 611; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars ($50.00), or imprisoned not more than 30 days".

Chapter 89C.

Editor's Note. — The legislation and annotations affecting Chapter 89C have been included in a recently published replacement chapter.

Chapter 89D.

Landscape Contractors.

Sec.
89D-5. Application for certificate; examination; renewal.

Sec.
89D-7. Denial, revocation or suspension of certificate.

§ 89D-5. Application for certificate; examination; renewal.

(a) Any person, partnership, association or corporation hereinafter desiring to register and be titled as a landscape contractor shall make written application for a certificate of title to the Board on such forms as are prescribed by the Board. Each applicant for a certificate of title as a landscape contractor shall be at least 18 years of age. Prior to July 1, 1976, each applicant for a certificate shall have been actively engaged as an untitled landscape contractor for at least one year prior to date of application. After July 1, 1976, an applicant shall furnish evidence satisfactory to the Board of three years' experience in landscape contracting or the completion of a study or combination of study and experience in landscape contracting equivalent to three years' experience under a landscape contractor.

(b) Any person who applies to the Board to be registered and titled as a landscape contractor shall be required to take an oral or written examination to determine his qualifications. Each application for registration by examination shall be accompanied by an application fee of fifty dollars ($50.00).

The Board shall compile a manual from which the examination will be prepared. The examination fee shall not exceed seventy-five dollars ($75.00). Any one failing to pass an examination may be reexamined upon payment of the same fee as that charged to persons taking the examination for the first time, in accordance with such rules as the Board may adopt pertaining to examinations and reexaminations.

If the results of the examination are satisfactory, the Board shall issue the applicant a certificate authorizing him to be titled as a landscape contractor in the State of North Carolina upon payment of the initial certification fee as outlined in subsection (c).

(c) All certificates granted and issued by the Board under the provisions of this Chapter shall expire annually on December 31. Renewal of such certificates may be effected at any time during the month preceding the expiration date of such certificates upon proper application to the Board accompanied by the payment to the secretary-treasurer of the Board of a renewal fee, as set by the Board, of not more than fifty dollars ($50.00). The fee for an initial certificate shall be the same as for a renewal certificate and is in addition to the application fee. All certificates reinstated after expiration date thereof shall be subject to a late filing fee of ten dollars ($10.00). In the event a registrant fails to obtain a reinstatement of such certificate within 12 months from the date of expiration thereof, the Board may, in its discretion, consider such registrant subject to the provisions of this Chapter relating to the issuance of an original certificate. Duplicate certificates may be issued by the

Board upon payment of a fee of one dollar ($1.00) by the registrant. (1975, c. 741, s. 5; 1983, c. 108, ss. 2, 3; 1991, c. 180, s. 1.)

Effect of Amendments. — The 1991 amendment, effective May 30, 1991, in the second paragraph of subsection (b), substituted "seventy-five dollars ($75.00)" for "twenty-five dollars ($25.00)."

§ 89D-7. Denial, revocation or suspension of certificate.

(a) The Board shall have power to revoke or suspend certificates of title herein provided. The Board may upon its own motion or upon a verified complaint in writing hold a hearing as hereinafter provided to investigate the actions of any titled landscape contractor. The Board shall have the power to suspend or revoke any certificate of title issued under the provisions of this Chapter if the registrant has by false or fraudulent representations obtained a certificate; if the registrant has been convicted or has entered a plea of nolo contendere to any crime involving moral turpitude in any court, State or federal; if the registrant is found to have committed any act which constitutes improper, fraudulent or dishonest dealing; or if the registrant violates any rule or regulation duly promulgated by the Board.

(b) Chapter 150B of the General Statutes applies to proceedings under this section to deny, revoke, or suspend a certificate. (1975, c. 741, s. 7; 1987, c. 827, s. 74.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, rewrote subsection (b).

Chapter 89E.

Geologists Licensing Act.

Sec.
89E-22. (Effective October 1, 1994 — See editor's note) Misdemeanor.

§ 89E-1. Short title.

Cross References. — As to limited liability companies and their powers, see § 57C-2-01 et seq.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 89E-18. Prohibitions; unlawful acts.

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 89E-22. (Effective October 1, 1994 — See editor's note) Misdemeanor.

Any person who shall willfully practice publicly, or offer to practice publicly, geology for other natural or corporate persons in this State without being licensed in accordance with the provisions of this Chapter, or any person presenting or attempting to use as his own the license or the seal of another, or any person who shall give any false or forged evidence of any kind in obtaining a license, or any person who shall falsely impersonate any other licensee of like or different name, or any person who shall attempt to use an expired or revoked license or practice at any time during a period the Board has suspended or revoked the license, or any person who shall violate the provisions of this Chapter shall be guilty of a Class 2 misdemeanor. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1993, c. 539, s. 613; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor; upon conviction thereof, such person shall be punishable by a fine of not more than five hundred dollars ($500.00), by imprisonment of not more than six months, or both such fine and imprisonment."

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1994

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1994 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina